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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1331

NATIONAL CITIZENS COMMITTEE
FOR BROADCASTING,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Citizens Committee for Broadcasting ("NCCB") hereby prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on November 11, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-45a) is not yet reported. The opinions of the Federal Communications Commission are reported at 48 FCC2d 1 (1974) (App. B, *infra*, pp. 46a-77a) and 58 FCC2d 691 (1976) (App. C, *infra*, pp. 78a-101a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission violated the First Amendment to the United States Constitution or Section 315 and the public interest standard of the Communications Act of 1934, as amended, 47 U.S.C. §315, when it decided that the fairness doctrine does not apply to product advertising.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. §315(a), provides, in relevant part, that the specific statutory provision applicable to uses of a licensee's facilities by political candidates shall not:

> be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT OF THE CASE

This case concerns a far-reaching ruling of the Federal Communications Commission ("FCC" or "Commission") which stated that even though a radio or television licensee broadcasts advertisements for certain products, the sale and use of which may constitute a controversial issue of public importance, neither the First Amendment nor the Communications Act requires that the fairness doctrine be applied in order to assure that the public receives contrasting views on the desirability of product sale and use.

The fairness doctrine requires that whenever a licensee broadcasts programming which presents arguments on one side of a controversial issue of public importance, it must afford a reasonable opportunity for the presentation of opposing views. In 1971, the FCC issued a notice of inquiry in which it expressed its intention to examine, *inter alia*, the application of the fairness doctrine to paid advertisements. *Notice of Inquiry*, 30 FCC2d 26. The Commission stated its concern about the precedential effect of a prior decision requiring that licensees present anti-smoking announcements to insure that the public receive views on smoking which contrasts with those presented in cigarette ads. *WCBS-TV*, 8 FCC2d 381, upon reconsid. 9 FCC2d 921 (1967), aff'd., *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. den., sub nom., Tobacco Institute v. FCC*, 396

U.S. 842 (1969). It noted, for example, that it had been asked to apply this rationale to ads for large automobiles, but had refused to do so, *Letter to Gary Soucie*, 24 FCC2d 743 (1970), rev'd., *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971).

The importance of this issue is reflected in the numerous comments received by the Commission. One the one hand, broadcasters typically argued that the cigarette ruling should no longer be followed. However, retention and extension of the ruling was supported by NCCB, the Federal Trade Commission and numerous consumer and environmental organizations.

The results of the Commission inquiry, the 1974 *Fairness Report*, purported to be a thorough re-examination of the application of the fairness doctrine to product ads. Referring to its previous decision as to cigarettes, the Commission recognized that typical product ads "addressed themselves solely to the desirability of the product." (App. 68a). It admitted that in previous years it had defined such product ads as addressing a controversial issue of public importance for fairness doctrine purposes. Thus, where controversial products were claimed in advertisements to be attractive or enjoyable, licensees would have been required under this rationale to inform the public that certain highly controversial products were undesirable for reasons of health, safety, etc.

In the *Fairness Report* the Commission abandoned this approach. It concluded that the application of the fairness doctrine to product ads was a "serious departure from the doctrine's central purpose which, of course, is to facilitate 'the development of an informed public opinion.'" (App. 68a) The critical basis for this conclusion was the Commission's statement that standard product commercials "make

no meaningful contribution toward informing the public on any side of any issue." (App. 68a). It found its major support for this statement in one paragraph of the 1968 *Banzhaf* decision:

> Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. 405 F.2d 1101-1102.

Based upon this notion of commercial speech, the Commission concluded:

> In this light, it seems to us to make little sense to view advertisements such as these as presenting a meaningful discussion of a controversial issue of public importance. (App. 69a).

Having arrived at this conclusion, the Commission examined the results which were said to follow. For example, the Commission determined that the continued application of the fairness doctrine to product ads would leave the public with information on only one side of the controversial issue of product sale and use – *i.e.*, the anti-product side (App. 69a). If product ads had provided the public with information "relevant to the underlying issue of smoking and health" in the cigarette ad case, or "in the context of the air pollution controversy . . . [and] the underlying issue of how to deal with the problem of air pollution" in the case of large automobiles, only then would the Commission be able to find some "meaningful discussion". (App. 68a-69a).

Absent reference to such underlying issues, the Commission reiterated that the standard product commercial does not "inform the public on any side of a controversial issue of public importance" (App. 70a). In fact, the Commission went further to conclude that "it would be a great mistake to consider standard advertisements . . . as though they made a meaningful contribution to public debate." (App. 70a). To the extent that licensees had to consider presenting views in contrast to those expressed in favor of product desirability, "it would divert the attention of broadcasters from their public trustee responsibilities in aiding the development of informed public opinion." (App. 70a). In denying reconsideration in 1976, the Commission adhered to this rationale. (App. 84a-86a).

The D.C. Circuit affirmed the Commission's result. Yet, it found that "[t]he conclusion reached by the Commission is stated over-broadly: clearly, standard product promotions inform the public about many matters, such as price and efficacy." (App. 22a). However, the D.C. Circuit found the Commission's ultimate decision correct:

> The persuasiveness – or lack thereof – of the Commission's essential finding, that a standard product commercials do not present a 'meaningful discussion of a controversial issue of public importance', [note omitted] is not altered by the recent expansion of first amendment protection in the area of commercial speech. (App. 22a).

In fact, the D.C. Circuit determined that since commercial speech has First Amendment protection, the "chilling effect" associated with requiring licensees to offset product advertising would "make application of the fairness doctrine to such speech less, rather than more, desirable." (App. 23a).

Accordingly, the D.C. Circuit found no violation of the First Amendment rights of the public, despite the fact that views on the undesirability of the sale and use of certain highly controversial products would no longer be required to be presented.

The D.C. Circuit also found that the Commission's decision did not violate the standards of the Communications Act, nor was it arbitrary, capricious or an abuse of discretion. It rejected arguments that Congress' codification of the fairness doctrine in 1959 was intended to encompass the application of the doctrine to product ads. (App. 26a). It also decided that the *Banzhaf* approach does not inhere in the public interest standard of the Communications Act. Recognizing that the *Banzhaf* decision and its progeny stated that the cigarette ruling was "required by the public interest", the D.C. Circuit found that "both the Commission and this court used stronger language than was necessary". (App. 26a).

Central to the court's decision on the non-constitutional issues was its approval of the Commission's rationale that "promotional presentations are not 'meaningful discussion[s] of . . . controversial issue[s] of public importance." (App. 29a). From this premise, the D.C. Circuit proceeded to agree that application of the fairness doctrine to product ads would leave the public informed on only one side of a controversial issue, that it would divert licensees' attention from more serious questions, and that it could adversely affect the economic well-being of some stations. (App. 30a). However, as to the second of these points, the court said "[w]e caution . . . that it is doubtful that the new FCC policy will substantially lessen the difficulties of drawing the line between advertisements which do and those which do not incur fairness obligations." And on the economic argument,

the court admitted that "no evidence has been presented which indicates that the *WCBS-TV* policy [note omitted] had an adverse impact on commercial broadcasters" (App. 31a), so that the economic argument is not "conclusive standing alone". (App. 31a).

I. THE DECISIONS BELOW ARE BASED ON PRINCIPLES WHICH ARE THOROUGHLY INCONSISTENT WITH THIS COURT'S RECENT COMMERCIAL SPEECH CASES.

The D.C. Circuit's opinion stands this Court's recent commercial speech doctrine on its head. Not only have the Commission and the lower court refused to recognize the full import of that doctrine in this case, but they have improperly used it to protect product advertising from coverage under the fairness doctrine.

The new attitude toward commercial speech can find its genesis in Mr. Justice Brennan's dissent in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Writing for himself and three other members of this Court, he stated that "commercial advertising often communicate[s] information and ideas found by many persons to be controversial." 418 U.S. at 314. In the context of the case before him, Mr. Justice Brennan posited the inherent unfairness of allowing the display of an advertisement for a controversial product like a snowmobile without permitting opposing arguments against the sale and use of this product to receive comparable exposure. This argument was not reached by a majority of this Court's members because of the prevailing view that display advertising on a city-owned bus system was not akin to a public forum.

Later, in *Bigelow v. Virginia*, 421 U.S. 809 (1975), Mr. Justice Blackmun's majority opinion cited the *Lehman* dissent with approval in finding that states could not prohibit abortion services advertising. Ads for those services, not unlike other ads associated with controversial products or services, involve "the exercise of freedom of communicating information and disseminating opinion." 421 U.S. at 822. That an ad proposes a transaction in the marketplace of products or services "does not make it valueless in the marketplace of ideas." 421 U.S. at 826.

In the seminal ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976), this Court stated that "[s]ociety also may have a strong interest in the free flow of commercial information." To the extent that individual consumers must choose between competing products or even determine not to purchase at all, "those decisions, in the aggregate, [must] be intelligent and well-informed." 425 U.S. at 765.

The Commission's decision to exempt product ads from the fairness doctrine is at odds with every First Amendment principle discussed in these cases. For example, in stark contrast to the D.C. Circuit's finding that standard product commercials cannot be said to present a "meaningful discussion of a controversial issue of public importance" (App. 22a), this Court found that in our free enterprise system, information about products "is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Virginia State Board of Pharmacy, supra*, 425 U.S. at 765. Surely, if product ad information leads to the formation of intelligent opinions relating to the regulation or alteration of aspects of our free enterprise system – for example, opinions about the desirability of products like cigarettes, saccharin, or phosphate

detergents which are involved in controversial and publicly important disputes – then the advertisement's presentation of the product's benefits must be said to be "meaningful discussion" of those controversies. This Court's opinions leave no room for an opposite conclusion. Yet, the entire thrust of the Commission's ruling, and the major argument accepted by the D.C. Circuit, is that standard product commercials engage in no such "meaningful discussion", regardless of what product is advertised.

Furthermore, contrary to the FCC's and D.C. Circuit's presumption that such "meaningful discussion" could result only if the ad addressed "underlying issues", this Court has refused to require such commentary as a prerequisite to the finding that public opinion is indeed formed as the result of product advertising. *Virginia State Board of Pharmacy, supra,* 425 U.S. at 764. In fact, in the context of the fairness doctrine, Chief Judge Bazelon has stated that if the Commission ever were to require that underlying issues be addressed before the doctrine applies, it would "gut the Fairness Doctrine". *National Broadcasting Co. v. FCC,* 416 F.2d 1101, 1169 (D.C. Cir. 1975) (dissent from refusal to grant rehearing *en banc*).

As to the concern of the D.C. Circuit that the new commercial speech cases require protecting broadcasters who might be "chilled" from selling time for product ads, this Court has reached an opposite conclusion: "Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." *Virginia State Board of Pharmacy, supra,* 425 U.S. at 771-772, note 24.

In short, the entire basis upon which the Commission proposes to administer the fairness doctrine's application to product advertising has been completely undermined by the

recent decisions of this Court. Before such a reading by an important federal agency of the commercial speech cases is permitted to stand, the issue should be reviewed by this Court.

II. THE DECISIONS BELOW HAVE CREATED AN IMPORTANT GAP IN THE ADMINISTRATION OF THE FAIRNESS DOCTRINE ON CRITICAL ISSUES RELATING TO HIGHLY CONTROVERSIAL PRODUCTS.

In 1973, this Court ruled that licensees could refuse to sell air time to members of the public who wish to present their views on controversial issues of public importance. In response to arguments that the ruling would unreasonably restrict the First Amendment right of the public to receive alternative opinions, the Court noted that the FCC was then conducting a broad inquiry into the fairness doctrine "to see what needs to be done to improve the coverage and presentation of public issues on the broadcast media." *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 131 (1973). The Court took comfort in the fact that under the fairness doctrine, the "affluent" could not dominate the airwaves and that in connection with its inquiry, the Commission expressed an intention not to discard the fairness doctrine. Quoting from the decision in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969), the Court said:

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. *Columbia Broadcasting System, supra,* 412 U.S. at 102.

Since that time, however, the Commission has acted to eliminate – rather than improve – the coverage of public issues relating to the sale and use of highly controversial products. It has done so by discarding the fairness doctrine's application to standard product commercials, largely because of a misplaced reliance on the commercial speech cases. As a result, the Commission has extinguished the public's First Amendment right to receive contrasting views on issues relating to controversial products. For example, not only can a member of the public be precluded from buying air time to argue against the desirability of saccharin or phosphate detergents, but a licensee has no duty under the fairness doctrine to present such arguments even if it sells time to an advertiser who promotes these highly controversial products.

This gap in the administration of the fairness doctrine is critical. While the sale and use of various products may engender substantial disputes, not every dispute will rise to the level of a controversial issue of public importance; surely ads for panty hose and carpeting can be distinguished from ads for saccharin under the *Fairness Report's* section that defines the factors which make an issue "controversial" and of "public importance." (App. 55a-56a). The Commission, however, proceeded to extinguish the fairness doctrine's application to *all* standard product ads. Having guaranteed in *Columbia Broadcasting System, supra,* that a licensee can prevent the public from hearing paid announcements that discourage the sale and use of certain highly controversial products, this Court should act to assure that the fairness doctrine is administered in a manner that protects the public's right to receive such contrasting views.

The impact of the Commission's ruling is not academic. When cigarette ads were broadcast, it was reliably asserted that the presentation of anti-smoking programming signifi-

cantly contributed to decreased consumption of the product and, consequently, benefited the public health of the nation. It is not too speculative to recognize that other public health and environmental objectives will be better served if the public is informed about many of the undesirable aspects of products which are promoted on radio and television. It is not a question of "the government" view being advocated, since the government may, in fact, have no hard-and-fast policy on a particular product's desirability. That decision is ultimately left to the consumer, who must balance the pros and cons. The marketplace of ideas can help determine which products can, and should, survive in the commercial marketplace. But under the paternalistic protectionism afforded product advertisers pursuant to the *Fairness Report*, the public will never be assured of hearing the "cons" and, therefore, the marketplace can not be guaranteed to operate properly.

If there was any doubt that this administration of the fairness doctrine represents an anti-consumer attitude that runs afoul of the First Amendment, this Court's admonition in *Virginia State Board of Pharmacy, supra*, 425 U.S. at 770, should dispel that doubt:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

For these reasons, the Commission's determination not to apply the fairness doctrine to standard product ads should not be allowed to stand without review by this Court.

III. THE DECISIONS BELOW REPRESENT AN IMPROPER APPLICATION OF THE COMMUNICATIONS ACT THAT HAS SERIOUS IMPLICATIONS FOR OUR SYSTEM OF BROADCASTING.

The decision to remove one entire category of speech – product advertising – from the ambit of the fairness doctrine will serve to undermine the general application of the fairness doctrine. Furthermore, it will interfere with the government's ability to protect the public against possible hazards associated with certain products.

As this Court recognized in *Red Lion, supra,* the fairness doctrine occupies a central role in the administration of the Communications Act. Yet, the opinions below have created a hole in the fabric of that Act which is not authorized. As early as 1946, the Commission ruled that "[t]he fact that the occasion for [a] controversy happens to be the advertising of a product [in that case, liquor] cannot serve to diminish the duty of the broadcaster to treat it as an issue." *Sam Morris,* 11 FCC 197 (1946). When the FCC formalized the fairness doctrine in its report on *Editorializing by Licensees,* 13 FCC 1246, 1249-1250 (1949), it reaffirmed the principle that the obligation to present contrasting views fully applies "to all subjects of substantial importance to the community", citing, among other cases, *Sam Morris.* The same position was expressed by the Acting Chairman of the FCC to Congress in 1952, when he specifically stated that although an ad "extolling the virtues" of a product may be "routine advertising" for some people, to others it may

"represent the advocacy of a practice which they deem detrimental to our society"; accordingly, the fairness doctrine is fully applicable. *Hearings on S. 2444 Before the Senate Committee on Interstate and Foreign Commerce*, 82d Cong., 2d. Sess. 7 (1952).

When Congress amended Section 315 of the Communications Act and thus "codified" the concept of fairness in 1959, several members remarked that the doctrine was "intended to encompass all legitimate areas of public concern which are controversial." 105 Cong. Rec. 17831 (Sen. Scott). No suggestion was ever made that the doctrine's application to standard product ads should be eliminated. While this Court has made it clear in *Red Lion, supra*, 395 U.S. at 385, that by acting in 1959 Congress did not approve every past pronouncement by the Commission on the doctrine, neither was the Commission given a "free hand" to cut a broad swath which removes an entire category of speech from the concept of fairness.

Shortly after the 1959 codification, the Commission reiterated that paid announcements are subject to the doctrine. *Public Notice on Controversial Issue Programming-Fairness Doctrine*, 25 P & F Radio Reg. 1899, 1900 (1963). See also, *Mrs. Madelyn Murray*, 40 FCC 647, 648 (1965) (concurring opinion). In 1967 the *Sam Morris* principle again emerged with the decision in *WCBS-TV, supra.*

Legislative attempts to overturn *WCBS-TV* proved fruitless. See, *e.g.*, H.R. 11531, 90th Cong., 1st Sess. (1967). Not only did the D.C. Circuit find the cigarette ruling to be proper, but it ruled that it was "required by the public interest." *Banzhaf, supra*, 405 F.2d at 1092. A long string of cases in that Circuit recognized the importance of the fairness doctrine's application to advertising for highly controversial products, *e.g., Friends of the Earth, supra; Retail*

Store Employees Union, Local 880, R.C.I.A. v. FCC, 436 F.2d 248 (D.C. Cir. 1970), even when the facts of a particular situation did not call for application of the doctrine. *Neckritz v. FCC*, 502 F.2d 411 (D.C. Cir. 1974).

The history of the critical role of the fairness doctrine in assuring the public adequate information about highly controversial products is testimony to the importance of this principle in the administration of the Communications Act. Significantly, "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is one intended by Congress." *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Not only has Congress failed to overturn the *WCBS-TV* principle, but this Court itself has continually cited the *Banzhaf* case approvingly, even after the Commission discarded it as precedent.[1] *E.g., Bigelow, supra*, 421 U.S. at 825, note 10; *Virginia State Board of Pharmacy, supra*, 415 U.S. at 771-772, note 24. A decision which has purged the *Banzhaf* case as precedent obviously will have broad ramifications for the implementation of the Communications Act. It should not be allowed to stand without review by this Court.

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[1] Ironically, the D.C. Circuit had no difficulty in applying this principle when it decided that a case-by-case *ad hoc* administration of the fairness doctrine, rather than enforcement solely at renewal time, was proper. It stated that if this Court "in *CBS v. DNC* had intended to invalidate all case-by-case procedures employed by the FCC, it is unlikely that it would have reaffirmed *Red Lion, supra*, decided by the Commission in just this manner, without at least mentioning its disapproval of the manner in which that case had come before it [note omitted]." Analogously, it is unlikely that this Court intends *Banzhaf* to be forgotten in view of the continued citation of that decision in recent opinions by this Court.

Furthermore, the Commission's insistence that only comments on "underlying issues" can trigger the fairness doctrine will serve to destroy the doctrine. The D.C. Circuit recognized that "implicit" advocacy in product ads was no longer subject to the fairness doctrine. (App. 27a). Yet, it interpreted the Communications Act to require that so long as the Commission applies the doctrine "whenever there is direct, obvious, or explicit advocacy on one side of a controversial issue of public importance, it will be acting consistent with the public interest standard." (App. 27a).

There is absolutely no precedent for this ruling. Because the decision is so important and cannot be limited to product ads, an ultimate determination by this Court is essential. As Chief Judge Bazelon candidly stated in another case, *National Broadcasting Co., supra,* 516 F.2d at 1169:

> So, the Court's own implicit message must be that the FCC may not resort to the implicit issue principle but may apply the Fairness Doctrine only to overt editorializing denominated as such. No reasons are advanced for such a holding. It would be inconsistent with previous cases in this Circuit [note omitted] and would gut the Fairness Doctrine.

The D.C. Circuit could have arrived at its conclusion only by ignoring this Court's commercial speech decisions. While the Court and the Commission have said that a product ad which expressly attempts to sell an item like cigarettes or saccharin only "implicitly" addressed the highly controversial issue of the desirability of that product's sale and use, that conclusion is hardly logical or factually supportable. The issue of desirability is part and parcel of the question of sale and use. To suggest otherwise is to undermine the

basis for regulating claims about a product's qualities or lack thereof in other contexts.

Finally, the decisions below have read the Communications Act to exclude consideration of the "public health" as part of the public interest standard. (App. 69a, note 22). The major if not sole, reason that disputes over the sale and use of certain products may rise to the level of a controversial issue of public importance is precisely because of the risk of negative health effects on the individual or the public at large. *E.g., Banzhaf, supra,* 405 F.2d at 1096, where it was said that "the public interest standard indisputably includes the public health"; or *Friends of the Earth, supra,* 449 F.2d at 1169, which referred to the "hazards of health implicit in air pollution". While neither of these cases required a licensee to present an "official" or "accepted" view on a particular health issue, they did mandate that contrasting views be aired where an initial decision has been made by the station to accept advertising that promotes products with adverse health risks. By having expressly rejected the principle that the public interest standard includes reference to the public health (App. 69a, note 22), both the Commission and the D.C. Circuit have greatly diminished the role played by the Communications Act in allowing for the public to be informed on all sides of critical health-related disputes. This Court should determine whether the Communications Act was meant to be read in this manner.

CONCLUSION

For the above reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notes: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1700

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING and FRIENDS OF THE EARTH, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC. (ABC) CBS, INC., INTERVENORS

No. 76-1351

COMMITTEE FOR OPEN MEDIA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

COUNCIL ON ECONOMIC PRIORITIES and UNITED FARM WORKERS OF AMERICA and HENRY GELLER, INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 76-1360

COUNCIL ON ECONOMIC PRIORITIES, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

UNITED FARM WORKERS OF AMERICA, INTERVENOR

Petitions for Review of Orders of
the Federal Communications Commission

Argued April 29, 1977

Decided November 11, 1977

Judgment entered this date

Tracy Westen, with whom *Geoffrey Cowan* was on the brief, for petitioners in No. 74-1700.

Charles M. Firestone, with whom *Frank W. Lloyd, III*, was on the brief, for petitioner in No. 76-1351.

Harvey J. Shulman and *Collett Guerard*, with whom *Carol J. Jennings* was on the brief, for petitioner in No. 76-1360 and intervenors, Council on Economic Priorities and United Farm Workers of America, AFL-CIO in No. 76-1351.

C. Grey Pash, Jr., Counsel, Federal Communications Commission, with whom *Werner K. Hartenberger*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, and *Robert B. Nicholson*, Attorney, Department of Justice were on

the brief, for respondents. *Ashton R. Hardy*, General Counsel, Federal Communications Commission at the time the record was filed, entered an appearance for respondent Federal Communications Commission. *Joseph A. Marino*, and *John E. Ingle*, and *Stephen A. Sharp*, Counsel, Federal Communications Commission, also entered appearances for respondent Federal Communications Commission. *Carl D. Lawson* and *Barry Grossman*, Attorneys, Department of Justice, entered appearances for respondent United States of America.

Joel Rosenbloom, with whom *J. Roger Wollenberg*, *Stephen A. Weiswasser*, *Michael S. Schooler*, and *Donald C. Langevoort*, were on the brief, for intervenor CBS, Inc. in No. 74-1700 also argued for intervenor American Broadcasting Companies, Inc.

Henry Geller for intervenor, Henry Geller in No. 76-1351.

James A. McKenna, Jr. and *Carl R. Ramey* were on the brief for intervenor, American Broadcasting Companies, Inc. in No. 74-1700.

Before WRIGHT, MCGOWAN and TAMM, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: These three consolidated petitions for review challenge various aspects of the Federal Communications Commission's *Fairness Report*. That *Report* was the product of an inquiry by the FCC, extending five years from its initiation in 1971, the issuance of the *Report* in 1974, and the denial of reconsideration in 1976, into the policies underlying the fairness doctrine and their implementation. It was the first such sustained review since the doctrine was originally articulated by the Commission nearly thirty years ago; and it was a proceeding in which written comments were received from over 120 persons or organizations, with eighty participants

in a week-long series of panel discussions and oral arguments held by the FCC in 1972.

For the reasons hereinafter appearing, we leave undisturbed the *Report* itself, including its central determination to withhold application of the fairness doctrine to broadcast communications promoting the sale of commercial products. Our remand to the FCC, however, is with directions to pursue further inquiry into two of the alternative courses of action proposed by some of the petitioners as ways by which the general objectives giving rise to the fairness doctrine can be realized.

I

The fairness doctrine, which is not identified in terms in the statutes administered by the FCC, had its inception in 1949.[1] The Notice of Inquiry initiating the reexamination, 30 F.C.C.2d 26 (1971), stated that the ensuing investigation would center around four major topics:

1. The fairness doctrine generally;
2. Application of the fairness doctrine to broadcast of paid announcements;
3. Access to broadcast media for discussion of public issues; and
4. Application of the fairness doctrine to political broadcasts.

The issues considered on this appeal relate to all but the last of these topics, which was the subject of a separate report issued in 1972.[2]

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[1] Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[2] First Report—Handling of Political Broadcasts, 36 F.C.C. 2d 40 (1972) (concerning application of the fairness doctrine to appearances by candidates and public officials).

[Continued]

In No. 74-1700, petitioners National Citizens Committee for Broadcasting (NCCB) and Friends of the Earth, and petitioner Council of Economic Priorities (CEP), in No. 76-1360, object to the decision in the *Fairness Report* not to apply the fairness doctrine to ordinary product advertisements, and further contend that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* (1970 § Supp. V 1975), requires the Commission to apply the fairness doctrine to advertisements for environmentally dangerous products.[3]

In No. 76-1351, petitioner Committee for Open Media (COM) challenges the Commission's failure, on reconsideration of the *Fairness Report*, to adopt, or order further inquiry into, its access proposal as an alternative to current fairness doctrine enforcement. Also in No. 76-1351, intervenor Henry Geller challenges the Commission's decisions to continue case-by-case consideration of fairness doctrine complaints, and its failure to consider and adopt

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[3] [Continued]

The *Fairness Report* itself appears as The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974). The FCC response to the requests for reconsideration is to be found in Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691 (1976) [*Reconsideration Order*]. Part V of the *Report* itself (at 31-33) deals with application of the fairness doctrine to ballot propositions—a matter which is not in issue here.

[4] Petitioner NCCB further urges that the FCC should have undertaken an Environmental Impact Statement before issuing the *Fairness Report*. NCCB argues that removal of product advertising from fairness doctrine application will result in more ads for environmentally dangerous products, more use of such products, and therefore more harm to the environment. We do not think that Congress intended to require preparation of an EIS dealing with such remote and speculative possibilities. *See* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

his "10-issue" proposal relating to the fairness doctrine requirement that a broadcaster devote a reasonable amount of time to coverage of public issues.[4]

Because the fairness doctrine and its application have been the subject of extensive commentary in prior decisions of both this court[5] and the Supreme Court,[6] we do not consider it necessary in this opinion to delve into these matters beyond the extent to which they directly impinge on the issues now before us. Similarly, we shall not comment upon those parts of the *Fairness Report* and order denying reconsideration which are not challenged on these appeals except to the extent they cannot be disentangled from the particular questions we confront.

Accordingly, we shall first consider, in Part II hereof, the challenges to the Commission's decisions with respect to the reach of the fairness doctrine. Part III of the opinion will address the specific contentions concerning the manner of enforcement of the fairness doctrine.

II

The *Fairness Report* concludes that the fairness doctrine should not be applied to broadcast advertisements promot-

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[4] In addition to petitioners and respondents Federal Communications Commission and United States of America and intervenors referred to above, additional intervenors in these cases are American Broadcasting Companies, Inc.; Columbia Broadcasting System, Inc.; and United Farm Workers of America, AFL-CIO. Each of these organizations participated in the FCC's fairness doctrine inquiry.

[5] National Broadcasting Co. v. FCC, 516 F.2d 1101 (D.C. Cir. 1974) [*Pensions*], *vacated as moot, id.* at 1180 (1975), *cert. denied*, 424 U.S. 910 (1976); Democratic National Committee v. FCC, 460 F.2d 891 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972); Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972); Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).

[6] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969).

ing the sale of a commercial product. This decision was made with a conscious awareness that it represents a marked shift from previous FCC policy. That previous policy, which was developed in a series of *ad hoc* decisions by the Commission and the courts, was never subject to precise articulation or definition, leading to uncertainty and difficulties in achieving full and fair enforcement. While we are under no illusion that the new policy, described more fully below, will solve all or perhaps even most of the implementation problems encountered heretofore, we believe that we are without warrant to deny the Commission the opportunity to attempt a new resolution of those difficulties provided that its action is consistent with constitutional and statutory commands and is otherwise in accordance with standards governing such an exercise of agency discretion. Our function in reviewing the validity of the Commission's decision to reverse its previous course of action is to ensure that it has

> provide[d] an opinion or analysis indicating that the [previous] standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.[7]

This standard is a distillation of the general criteria governing judicial review of an exercise of agency discretion in the context of informal rulemaking such as that before us. Our

> responsibility is to assure that the agency has not abused or exceeded its authority, that every essential element of the order is supported by substantial evidence, and that the agency has given reasoned consideration to the pertinent factors.[8]

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[7] Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

[8] *Pensions, supra* note 5, at 1122.

A. *Background*

The basic principles of the fairness doctrine were established long before the doctrine was given a label: broadcast licensees are obliged both to cover controversial issues of public importance and to broadcast opposing points of view on them.[9] The Commission and petitioners disagree as to when it became FCC policy to apply these obligations to ordinary commercial advertising. In a decision rendered in 1946, the Commission noted that fairness principles could be applicable to product advertisements if the latter involved controversial public issues.[10] The FCC's first comprehensive statement of the fairness doctrine in 1949 did not mention its applicability to product commercials, although the statement did refer approvingly to the FCC's 1946 decision.[11]

Whether or not these statements nearly three decades ago can be said to have established a policy of subjecting commercial advertisements to fairness requirements, it is undeniable that any such policy lay practically dormant until 1967.[12] In that year the Commission held in *WCBS-TV*, 8 F.C.C.2d 381, *upon reconsideration*, 9 F.C.C.2d 921, that cigarette commercials raised the controversial and publicly important issue of whether smoking is desirable,

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[9] *See, e.g.*, Great Lakes Broadcasting Co., 3 F.R.C. App. Rev. 32 (1929) ("Public interest requires ample play for . . . opposing views . . . [on] discussions and issues of importance to the public"), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

[10] Sam Morris, 11 F.C.C. 197 (1946).

[11] *Report on Editorializing*, *supra* note 1, at 1249-50 ("duty [to ensure dissemination of news and ideas] extends to all subjects of substantial importance to the community").

[12] In 1963 the Commission had advised broadcasters that a "paid announcement" could be subject to fairness doctrine obligations. Controversial Issue Programming, 40 F.C.C. 571, 572 (1963).

and thus gave rise to the second obligation of the fairness doctrine.[13] In *Banzhaf v. FCC* this court affirmed the Commission's authority to apply the fairness doctrine to cigarette advertisements.[14] In so doing, we recognized the unique danger to health posed by cigarettes but did not in terms foreclose the possibility that the Commission would be obliged to follow the cigarette precedent with respect to other product advertisements raising controversial issues of public importance.

In *Friends of The Earth v. FCC*, 499 F.2d 1164 (D.C. Cir. 1971), we held that, under the approach taken by the Commission with respect to cigarettes in *Banzhaf*, adver-

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[13] Throughout the history of fairness doctrine enforcement, much more attention has been given to this second obligation —the provision of opposing points of view on controversial issues about which only one viewpoint has been broadcast— than to the first, namely, the affirmative obligation to provide coverage of controversial and important issues. FCC has only once sustained a complaint relating to the part one obligation. *Patsy Mink*, 59 F.C.C.2d 987 (1976).

It is also clear that issues giving rise to the part two obligation would not necessarily be required to be covered under the first obligation; the threshold triggering of the second fairness obligation is lower than that which triggers the first. *See* Public Communications, Inc., 49 F.C.C.2d 27, *application for review denied*, 50 F.C.C.2d 395, 399-400 (1974). Certainly all parties in this case recognize this asymmetry with respect to product commercials. To our knowledge it was never suggested during the inquiry into operation of the fairness doctrine that broadcasters be affirmatively obligated to present views advocating use of controversial products. *Cf.* Cigarette Advertising and Anti-Smoking Presentations, 27 F.C.C.2d 453 (1970), *aff'd sub nom.* Larus & Bros. Co. v. FCC, 447 F.2d 876 (4th Cir. 1971) (broadcast of anti-smoking messages does not give rise to fairness doctrine obligation to broadcast views advocating smoking because the issue is no longer a matter of public controversy).

[14] 405 F.2d 1082 (1968), *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969).

tisements for high powered automobiles and leaded gasoline also gave rise to the fairness obligation to broadcast opposing points of view. Just as cigarette advertisements were thought to have raised the issue of the desirability of smoking, so also the advertisements at issue in *Friends of the Earth* posed the question of the desirability of motorist preferences which increased air pollution. Moreover, as had been true in the cigarette controversy, there existed uncontroverted evidence of the hazards to health caused by air pollution; and this was unquestionably a controversial issue of public importance. We thus found it impossible to ignore the analogy between the *Banzhaf* cigarette advertisements and the advertisements for cars and gasoline challenged in *Friends of the Earth;* and held that the FCC was obliged to follow the cigarette advertising precedent until and unless the Commission reformulated the policy that it had articulated in *WCBS-TV.*[15]

We noted in *Friends of the Earth* that

> [i]t is obvious that the Commission is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine.

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[15] 449 F.2d at 1169-71. Prior to *Friends of the Earth,* in Retail Store Employees Union, Local 880, R.C.I.A. v. FCC, 436 F.2d 248 (D.C. Cir. 1970), this court determined that product advertising by a department store which was being boycotted as a result of a labor dispute implicitly raised the issue of whether or not the store should be patronized, which, given the union strike and boycott, was a controversial issue of substantial public importance. *Id.* at 258. As was true in *Banzhaf* and *Friends of the Earth,* decided subsequently, the advertisements in *Retail Store Employees Union* did not discuss or even allude to an important issue in controversy. Yet in all three of these cases viewers or listeners were subjected to implicit advocacy of one side of such an issue.

449 F.2d at 1170. This may, if anything, have understated the problem. Once the Commission determined in *WCBS-TV* that implicit advocacy gave rise to the fairness doctrine obligation to broadcast opposing points of view, it inevitably became necessary to draw a line between messages so opaque that it could not fairly be said a controversial issue was adumbrated, and messages which have the clear effect of advocacy, albeit in a subtle and nonexplicit manner.

In *Neckritz v. FCC*, 502 F.2d 411 (D.C. Cir. 1974), this court refused to find than an advertisement for a gasoline additive purportedly helpful in reducing automobile emissions raised the controversial issue of auto pollution. Under the approach taken in *Banzhaf* and *Friends of the Earth*, the court could have reached a different conclusion under the following chain of reasoning: 1) the gasoline additive can be used only in conjunction with gasoline, and, indeed, the challenged advertisements promoted the sale of gasoline with the additive; 2) advocating the use of gasoline raises the desirability of such use; 3) gasoline use causes air pollution,[16] which is a controversial issue of public importance; 4) thus, the advertisements raised a controversial issue of public importance. An advertisement with the theme of reducing air pollution would have been held to give rise to the fairness obligation to present the point of view that the product promoted would not reduce air pollution.

This is different from the situations in *Banzhaf*, *Retail Store Employees Union*, and *Friends of the Earth*, where the advertisements implicitly took a position on the ultimate public issue, rather than a position on ways to solve the ultimate matter in controversy. The court in *Neckritz*

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[16] Petitioners argued that since the advertised additive was found only in leaded gasoline, the advertisements were in effect for leaded gasoline, which contributes more to auto pollution than does nonleaded gasoline.

thus limited the reach of the approach stated in *Banzhaf* for application of the fairness doctrine to product commercials: debate over the *efficacy* of a product in solving an issue of public concern does not raise that issue. The basic policy choice underlying the *Neckritz* holding is that the fairness doctrine should not be transformed into a vehicle for correction of allegedly false advertising.[17] However, it is understandable that some confusion was caused by the holding in *Neckritz*, on the one hand, that a commercial explicitly mentioning a matter of public concern does *not* give rise to fairness obligations, and the holding in *Friends of the Earth*, on the other, that a commercial only implicitly raising that same issue *does* give rise to fairness obligations.[18]

The difficulty of defining issues "implicitly" raised by product promotions is only one source of the confusion which resulted from the decision in *WCBS-TV* to apply the fairness doctrine to commercial advertisements. It has also proven difficult to apply the fairness doctrine to advertisements which do not directly promote a product. Thus, in *Green v. FCC* this court affirmed the FCC conclusion, 24 F.C.C.2d 171 (1970), that armed forces recruitment messages did not raise the issues of the military draft and the Vietnam war, which at the time were significant and controversial issues.[19] While we admitted that the issue of *voluntary* military recruitment was "implicit" in the challenged announcements, we were not pre-

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[17] 502 F.2d at 418. The court stated that charges of false advertising are a proper subject of investigation by the Federal Trade Commission. *Id.*

[18] *See* Simmons, Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective, 75 COLUM. L. REV. 1083, 1094 (1975).

[19] 447 F.2d 323 (D.C. Cir. 1971).

pared to conclude that the broader issue of the desirability of military service generally was thereby also raised.[20]

On the other hand, this court expressed agreement with the Commission's decision in *National Broadcasting*, 30 F.C.C. 2d 643 (1971), that advertisements by Esso advocating oil exploration and drilling in Alaska raised the then-controversial issue of whether the Alaska pipeline should be built, even though the advertisements under challenge did not refer to this issue or state explicitly that the pipeline should be built.[21]

Both *Green* and *National Broadcasting* involved a type of advertisement close to what has been called "institutional advertising"—that is "advertising that promotes the overall image of its sponsor and [only] indirectly its product."[22] In at least one important respect, it is even more difficult to articulate a workable standard for what constitutes an issue "implicitly raised" in the institutional advertising context than it is in the context of advertisements promoting a product or service, such as those in *Banzhaf*, *Retail Store Employees Union*, and *Friends of the Earth*. The latter *explicitly* advocate patronizing a product. In most cases, only one clear inference need be drawn in order to state the issue implicitly raised: the *desirability* of engaging in such purchases. Where the advertisement at issue merely presents the sponsor, or certain of its activities, in a favorable light, it could be concluded that every issue affecting the viability of the enterprise promoted is thereby "implicitly" raised.[23] The

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[20] *Id.* at 329-332. The court also held that even if the issues of the draft, the Vietnam war, and the desirability of military service were raised sufficiently for application of the fairness doctrine, these fairness obligations were met by adequate and complete coverage of these issues. *Id.*

[21] *See Friends of the Earth, supra* at 1170 (1971).

[22] *See* Simmons, *supra* note 18, at 1089.

[23] *See also* Media Access Project, 44 F.C.C.2d 755 (1973), where the Commission held that advertisements contending

Commission refused to take such an approach with respect to institutional advertising,[24] but, as was true with respect to ordinary product commercials, neither the Commission nor the courts were able to articulate clear criteria for ascertaining which issues are and are not "implicitly" raised by institutional advertisements.

B. *New FCC Policy with Respect to Commercial Advertisements*

The failure of either the courts or the Commission to delineate clearly in the foregoing decisions the contours of the *Banzhaf* approach to commercial advertising and the fairness doctrine may be ascribed in part to the very proceeding now under review.[25] Aware that a thorough inquiry into the fairness doctrine was pending, neither the agency conducting that inquiry[26] nor the courts[27]

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that the sponsor power company needed to expand its operations raised the issue of whether a pending request for a rate increase should be granted. One of these advertisements did *explicitly* advocate the desirability of "[a]n increase in price." *Id.* at 765 (Appendix I).

[24] *See, e.g.*, Anthony R. Martin—Trigona, 19 F.C.C.2d 620, 622 (1969) (institutional advertising by network and "praise of commercial television . . . cannot be regarded as clear criticism of pay television" and thus do not raise the pay television controversy).

[25] In *Green, supra* at 333 n. 19, this court stated that the pending fairness inquiry "should provide a helpful and much-needed illumination of the commercial advertising aspects of the fairness doctrine."

[26] *Cf.* Neckritz, 29 F.C.C.2d 807, 814 (1971) (Commission announced plan to undertake "thorough re-examination and rethinking" of broad issues relating to fairness doctrine and commercial advertising).

[27] *See Green, supra* at 333 & n.19 ("Other cases . . . will provide the appropriate occasions for critically tracing the contours of the public interest standard as it applies to com-

reviewing agency execution of current fairness doctrine policy were eager to use specific fairness complaints as a vehicle for comprehensive analysis of the efficacy and contours of the *Banzhaf* approach.[28]

The *Report* divides advertisements into three general categories: editorial advertisements; standard product commercials; and advertisements making product efficacy claims about which there is dispute. Henceforth, only those advertisements in the first of these categories will give rise to fairness doctrine obligations. While petitioners raise objection only to the *Report*'s treatment of standard product commercials, we believe that, to be adequately analyzed and understood, this portion of the *Report* must be considered in the context of FCC policy generally concerning application of the fairness doctrine to advertisements. Therefore, we shall briefly examine the *Report*'s conclusions with respect to each of the categories of advertisements listed above.

Editorial advertisements consist of "direct and substantial commentary" on controversial issues of public importance. *Fairness Report* at 22. The classic example of such an announcement is an "overt" editorial, *id.* at 22, referred to at another point in the *Report* as an advertisement "that explicitly raise[s] [a] controversial issue,"

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mercial advertising," citing, *inter alia*, the Commission's plans to undertake thorough inquiry into fairness doctrine); *Friends of the Earth, supra* at 1170 (noting pending fairness doctrine inquiry); *Neckritz*, 502 F.2d at 419 (Bazelon, J., voting to deny application for rehearing *en banc* in part because review of recently issued *Fairness Report* was then being sought).

[28] Thus, our general approval in this opinion of the decisions reached in the *Fairness Report* with respect to the applicability of the fairness doctrine to commercial advertisements should not be interpreted as expressing the view that an accommodation of fairness doctrine requirements with commercial advertisements consistent with the *Banzhaf* approach was not possible.

id. at 26.[29] However, the *Report* recognizes that certain advertisements which do not *explicitly* or *overtly* discuss a controversial issue nevertheless should be considered editorial advertisements because they present "a meaningful statement which obviously addresses, and advocates a point of view on," controversial issues of public importance, *id.* at 23.

The *Report* concludes that one type of announcement which may give rise to fairness doctrine obligations even though it is not an overt editorial is institutional advertising "designed to present a favorable public image of a particular corporation or industry rather than to sell a product." *Id.* Although institutional advertising "ordinarily does not involve debate on public issues," if the advertiser "seek[s] to play an obvious and meaningful role in public debate[,] . . . the fairness doctrine . . . applies." *Id.*[30] The Commission has attempted to provide some guidance for determining whether fairness doctrine obligations apply to advertisements that are not "explicitly controversial."[31] Licensees are advised that when the re-

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[29] "An example of an overt editorial advertisement would be a thirty—or sixty—second announcement prepared and sponsored by an organization opposed to abortion which urges a constitutional amendment to override a decision of the Supreme Court legalizing abortions under certain circumstances." *Fairness Report* at 22.

[30] The quoted phrase suggests that the advertiser's subjective intention is determinative of whether the commercial is an "editorial advertisement." However, the Commission at another point in the *Report* states it is not concerned with "the advertiser's actual intentions" in running an ad, but rather in whether the ad as presented "is an obvious participation in public debate." *Fairness Report* at 23.

[31] In view of the difficulty inherent in making this judgment, the Commission expressed its intention to allow licensees considerable leeway in deciding whether the advertisement at issue incurs fairness obligations. The Commission will uphold

lationship of an advertisement to ongoing debate in the community is substantial and obvious the ad is likely to represent "obvious participation in public debate." [23] In such circumstances, the fairness doctrine should be applied. *Id.* at 23-24.

We interpret the foregoing pronouncements concerning overt editorials and institutional advertising as reaffirmations of previous FCC policy in these areas. That portion of the *Report* dealing with standard product commercials, on the other hand, is an explicit departure from previous policy. The *Report* announces that advertisements for commercial products or services, such as the cigarette advertisements in *Banzhaf* and the automobile and gasoline advertisements in *Friends of the Earth*, henceforth will not give rise to fairness obligations because they "make no meaningful contribution to informing the public on any side of any issue," even though "the business, product, or service advertised is itself controversial." *Fairness Report* at 24. The Commission thus explicitly rejects the chain of reasoning first enunciated in *WCBS-TV*: that because promoting a product raises the issue of the desirability of its use, such promotion triggers application of the fairness doctrine if use of the product is a controversial issue of public importance.

Under the policy announced in the *Fairness Report*, promotion of controversial products will not require pres-

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the licensee's decision not to broadcast opposing points of view

> unless the facts are so clear that the only reasonable conclusion would be to view the "advertisement" as a presentation of one side of a specific public issue.

Id. at 24.

[23] The *Report* gives as an example an advertisement in which the arguments and views presented "closely parallel" the position of advocates on either side of a public issue, and cites *Media Access Project*, discussed at note 23 *supra*. *Id.*

entation of points of view opposing use or sale of the products. This does not mean that all product advertisements are exempt from fairness obligations, however. If in the course of promotion of a product there is "obvious and meaningful . . . discussion" on one side of a controversial issue impinging on the desirability of the product, fairness obligations attach because such advocacy qualifies as an editorial advertisement. *See id.* at 26.

The third and final category of advertisements discussed in the *Fairness Report* are product claims alleged to be false or misleading, such as the claims for a gasoline additive at issue in *Neckritz*, discussed above.[33] The *Report* essentially takes the position enunciated by this court in that case. In refusing to apply the fairness doctrine to those claims, the court in *Neckritz* distinguished between raising the issue of the effect of a product on a problem which is a controversial issue of public importance and directly raising the controversial issue itself. The opinion went on to suggest that a Federal Trade Commission action for false advertising was the appropriate way to resolve disputes over the truthfulness of efficacy claims.[34] Likewise, the *Report* concludes that product efficacy claims "play no meaningful or significant role in the debate of controversial issues," *Fairness Report* at 28. Under the policy announced in the *Report*, the FCC will forego

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[33] The *Fairness Report* has separate subsections dealing with editorial advertisements and standard product commercials. The application of the fairness doctrine to product efficacy disputes, however, is discussed in the course of the Commission's response to a specific proposal made by the Federal Trade Commission during the fairness doctrine inquiry. It nevertheless seems clear that the Commission intended to distinguish advertisements containing disputed product efficacy claims from standard product commercials generally promoting desirability and from editorial advertisements.

[34] *See* 502 F.2d at 418.

application of the fairness doctrine to product claims, however controversial those claims may be and however controversial the public issue to which they relate. The *Report* concludes that there exists an alternative and preferable "congressionally-mandated remedy for deceptive advertising . . . in the form of various FTC sanctions." *Id.* at 27-28.

C. *Constitutionality of the New FCC Policy*

As already mentioned, petitioners and intervenors in this case have not made specific objections to those portions of the *Fairness Report* that, in effect, reaffirm previous policy with respect to editorial advertisements and product efficacy claims. Nor does this court find any cause to upset these portions of the *Report*, which seem to us well reasoned and fully consistent with constitutional and statutory commands.

The *Report*'s treatment commercial advertising is vigorously challenged on both statutory and constitutional grounds. We believe that the challenges invoking the first amendment are based on a fundamental misunderstanding of the relationship between constitutional protection of commercial, or any other type of, speech and the functioning of the fairness doctrine.[35] As best we can determine, petitioners make two first amendment arguments. The first proceeds as follows:

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[35] Nor do we find petitioners' other constitutional arguments persuasive. For reasons stated herein, we do not think that "the Commission has engaged in an arbitrary, irrational and unconstitutional discrimination between speakers based on the content of their speech," Brief of CEP and United Farm Workers at 19, by distinguishing for fairness doctrine purposes between speech which is editorial in nature and speech which promotes use of a product. We also do not think that the distinctions set out in the *Fairness Report* are unconstitutionally vague.

(a) Commercial speech is protected under the first amendment because the public has an interest in the free flow of such information; [36]

(b) statements which oppose views presented in commercial advertisements are a form of commercial speech;

(c) thus, the public has an interest in the free flow of such statements;

(d) thus, the FCC must require its licensees to broadcast such statements.

But surely there is no right to broadcast a particular point of view simply because that point of view is protected by the first amendment. This was clearly established in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), which held that a network need not sell time to persons wishing to present their views on important public issues. Of course, this court has also recognized that speech protected by the first amendment need not necessarily be broadcast under the second obligation of the fairness doctrine.[37]

Petitioners' other first amendment argument begins with a slightly different application of *Virginia State Board*:

(a) to the individual, commercial information may be of more interest than is "the day's most urgent political debate," and such advertisements "may be of general public interest;" [38]

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[36] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976).

[37] *See, e.g.*, Neckritz v. FCC, 502 F.2d 411 (D.C. Cir. 1974); Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972); Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).

[38] 425 U.S. at 763-64.

(b) thus, commercial advertisements contribute meaningfully to public debate;

(c) the Commission's decision not to subject commercial advertisements to the fairness doctrine is therefore unconstitutional because it is based on the denial of (b).

The last proposition is a non-sequitur. There is a missing link in the argument, which is that all speech which contributes meaningfully to public debate must be subject to the fairness doctrine. We reject the suggestion that any speech protected by the first amendment must, as a matter of constitutional law, trigger application of the fairness doctrine. While an ultimate function of both the first amendment and the fairnes doctrine may be to encourage the dissemination of viewpoints and information, this does not mean that the two principles cover exactly the same ground.[39] There is an obvious difference between the standard employed by the Commission for determining whether the fairness doctrine applies to advertisements—that is, whether the advertisemnt advocates one side of a controversial public issue—and the holding in *Virginia State Board* that advertising is protected by the first amendment because it represents dissemination of valuable information important to the functioning of a free enterprise system. Nothing in the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), upholding the constitutionality of the political editorializing and personal attack rules promulgated under the fairness doctrine, suggests that the obligation to present opposing points of view must be

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[39] In *CBS v. DNC, supra* at 131-32, the Court, after noting that the Commission was conducting the inquiry on the fairness doctrine which is the subject of this appeal, concluded that "courts should not freeze this necessarily dynamic process [of accommodating broadcast regulation and first amendment rights of broadcasters and the public] into a constitutional holding."

applied to all constitutionally protected speech. Indeed, in most instances in which the fairness doctrine has been held not to apply, the speech which it was contended triggered application of the obligation was clearly protected by the first amendment.[40]

We recognize that petitioners' confusion between the standard for first amendment protection and the standard for application of the fairness doctrine may result from misplaced reliance in the *Fairness Report* itself on the scope of first amendment protection. Issued before either *Virginia States Board* or *Bigelow v. Virginia*,[41] the *Report* appeared to equate its conclusion that standard product commercials "make no meaningful contribution toward informing the public on any side of any issue" with the statement by this court in *Banzhaf* (also decided prior to *Virginia State Board* and *Bigelow*), that "[p]romoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect."[42] The conclusion reached by the Commission is stated overbroadly; clearly, standard product promotions inform the public about many matters, such as price and efficacy. However, the *correctness* of the conclusion is not dependent upon whether or not advertisements are associated with first amendment values. The persuasiveness—or lack thereof—of the Commission's essential finding, that standard commercials do not present "a meaningful discussion of a controversial issue of public importance,"[43] is not altered by the recent expansion of first amendment protection in the area of commercial speech.

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[40] *See, e.g.*, citations in note 37 *supra*.

[41] 421 U.S. 809 (1975). In striking down a Virginia statute prohibiting the advertising of abortion services, the Court stressed the public's interest in receiving such information, *id.* at 822.

[42] 405 F.2d at 1101, *quoted at Fairness Report* at 24-25.

[43] *Fairness Report* at 25.

Indeed, it can be argued that the first amendment protection afforded commercial speech cuts precisely contrarily from the manner urged by petitioners. It has been contended by commentators,[44] although viewed skeptically by the Supreme Court,[45] that broadcasters are discouraged from presenting messages which trigger fairness doctrine obligations. If the fairness doctrine does have this chilling effect, then first amendment protection of commercial speech would make application of the fairness doctrine to such speech less, rather than more, desirable. This was certainly the context in which the *Banzhaf* court—upholding the Commission's decision to subject cigarette advertisements to the fairness doctrine—discussed the relevance of first amendment consideration.[46]

D. *Statutory Challenges to the New Commission Policy*

It is alleged that the Commission's decision to withdraw standard product commercials from the purview of the fairness doctrine violates the standards of the Communications Act and was arbitrary, capricious and an abuse of discretion.[47]

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[44] *See, e.g.*, Dissenting Statement of Commissioner Robinson to the *Reconsideration Order, supra* note 2, at 703-11.

[45] *See Red Lion, supra* at 392-94. *But see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate,' " quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

[46] *See* 405 F.2d at 1101 ("The speech which might conceivably be 'chilled' by this ruling barely qualifies as constitutionally protected 'speech.' ").

[47] Petitioners also contend that the mandate of the National Environmental Protection Act of 1969 (NEPA), that "to the fullest extent possible" federal agencies administer policies, regulations, and public laws in accordance with NEPA and make available information concerning the environment, 42 U.S.C. § 4332(1), 2(F) (Supp. V 1975), requires that fair-

In the 1959 amendments to the Communications Act, 73 Stat. 557 (1959), 47 U.S.C. § 315(a), Congress made clear that the already existing statutory requirement that broadcasters operate in the "public interest" included the obligation "to discuss both sides of controversial issues," *Red Lion*, *supra* at 380. Petitioners contend that under this obligation, which the Supreme Court has said gave "statutory approval to the Fairness Doctrine," *CBS v. DNC*, *supra* at 110 n.8, the Commission must apply the fairness

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ness doctrine obligations be imposed with respect to commercials for environmentally dangerous products. This position misinterprets the effect of NEPA on federal agency action. The FCC must give consideration to questions of environmental quality, *see* Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C. Cir. 1971). Accordingly, the Commission has indicated that "broadcasters must cover pollution issues generally, under their obligation to broadcast in the public interest." Letter to Russell Train, Chairman, Council on Environmental Quality (Nov. 30, 1970), discussing Letter to Gary Soucie, 24 F.C.C.2d 743 (1970). However, the Commission is certainly entitled, indeed is obligated, to determine how best to accommodate the mandate of NEPA with its own mandate to afford a "reasonable opportunity for the discussion of conflicting views on issues of public importance," § 315(a) of the Communications Act, 47 U.S.C. § 315(a) (1970). For reasons explained below, we think the Commission's view that this mandate would not be served by applying fairness doctrine requirements to advertisements for controversial products (whether controversial for environmental or other reasons) is not unreasonable. We also agree with the recent statement of the First Circuit in response to the same argument as that made here:

> Given the prohibition in section 326 of the Communications Act against Commission censorship, we do not believe that . . . NEPA can be interpreted to compel the Commission to use its licensing power as a lever to impose special standards upon private licensees in the interest of the environment.

Public Interest Research Group v. FCC, 522 F.2d 1060, 1068 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

doctrine "to advertisements for products whose effects have engendered important controversies over the sale and use of the products." Brief of CEP and United Farm Workers at 32. This contention is based on the view that at the time of the 1959 amendments, it was Commission policy to apply the *WCBS-TV* approach to fairness obligations and commercial advertisements; that Congress recognized this policy; and that the 1959 amendments were intended to put the policy in statutory form. We believe that there is no persuasive evidence supporting the basic premise upon which this view is based. It was not clear Commission policy in 1959 to require broadcast of opposing views in response to the advertisements for controversial products.

The 1946 decision concerning commercial advertisements so heavily relied on by petitioners merely stated that debate over the "relative merits of one product or another" could raise "basic and important social, economic, or political issues." [48] The *WBCS-TV* approach extended upon this principle in determining that the promotion of a controversial product was an important and controversial issue. The *Fairness Report* contracts the potential scope of the principle in requiring that the controversial issue be directly and obviously raised in the debate. But neither the *WCBS-TV* approach nor the *Fairness Report* is inconsistent with the principle announced in the 1946 Commission decision.[49] Thus, while

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[48] Sam Morris, 11 F.C.C. 197, 198 (1946).

[49] In at least one instance prior to 1959, one member of the Commission did informally express a policy very similar to that of *WCBS-TV*. In a letter dated August 11, 1949, to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the Acting Chairman of the FCC explained that *Sam Morris* stood for the proposition that the mere commercial "plug" of liquor "may assume the proportions of a controversial issue of public importance," and that such advertising by itself could "raise serious social, economic, and political issues for the community," *reprinted at* Hearings Be-

the 1959 amendments to the Communications Act "codifi[ed] the standards of fairness," [50] we are not convinced that the *WBCS-TV* standard was one of the standards referred to.[51]

There still remains the possibility that the *WBCS-TV* approach inheres in the public interest standard of the Communications Act [52] regardless of whether Congress recognized this in 1959. We think that this view is unwarranted, and realize that both the Commission and this court used stronger language than was necessary in stating that the decision in *WCBS-TV* was "required by the public interest." [53] As this court [54] and the Supreme

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fore the U.S. Senate Committee on Interstate and Foreign Commerce on S. 2444, 82d Cong., 2d Sess., at 7 (1952). This letter is not referred to in the congressional history of the 1959 amendments to the Communications Act.

[50] Remarks of Chairman Pastore of the Senate Subcommittee on Communications, 105 CONG. REC. 14462 (July 28, 1959). *But see also Red Lion, supra* at 385, "When the Congress ratified the fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future."

[51] In *Banzhaf, supra* at 1092, we stated that *Sam Morris* has "not been followed in the twenty years since it was decided," and was "not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials." Statutory recognition of the fairness doctrine thus could not have included codification of the approach approved in *Banzhaf*.

[52] Section 315(a) of the Communications Act, 47 U.S.C. § 315(a) (1970), defines this standard as affording "reasonable opportunity for the discussion of conflicting views on issues of public importance."

[53] *Banzhaf, supra* at 1092, quoting Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 943 (1967).

We expressly noted in a later decision that the Commission had authority to reformulate the commercial advertising policy established in *WCBS-TV*. *Friends of the Earth, supra* at 1170.

[54] *See, e.g., Banzhaf, supra* at 1091, 1093.

Court [55] have emphasized, the public interest would not be served by taking away from the FCC all discretion in its administration of the general principles of the fairness doctrine. Clearly, application of fairness doctrine requirements to commercial advertisements has been fraught with difficulties; remaining faithful to the general principles of the doctrine, the Commission should be allowed to alter the precise contours of the doctrine in a manner it reasonably believes will help resolve those difficulties. As we have demonstrated, two of the greatest uncertainties in administration of the *WCBS-TV* approach were (1) ascertaining what issues were "implicitly" raised by standard product commercials and institutional advertising, and (2) determining when a view on a controversial issue of public importance was expressed so elliptically that it could not be said to have been "raised" for purposes of the fairness doctrine. The policies announced in the *Fairness Report* seem to us to be a straightforward attempt to remove these uncertainties by all-but-completely removing "implicit" advocacy from the confines of the fairness doctrine. As long as the Commission strictly enforces the core part two fairness obligation to present opposing points of view whenever there is direct, obvious, or explicit advocacy on one side of a controversial issue of public importance, it will be acting consistently with the public interest standard.

Nor do we believe that the Commission has acted arbitrarily or that it has abused its discretion in withdrawing most commercial advertisements from application of the fairness doctrine. Of course, the mere fact that the approach spelled out in the *Fairness Report* represents a definite change of policy does not require that it be struck

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[55] *See CBS v. DNC, supra* at 132 (fairness inquiry is one step in "a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees").

down. *American Trucking Associations, Inc. v. Atchison, Topeka and Santa Fe Railway*, 387 U.S. 397, 416 (1967). We further conclude that the Commission has "given reasoned consideration to each of the pertinent factors" [66] and that its policy choices with respect to the scope of the fairness doctrine are supported by substantial, though not necessarily conclusive, evidence.

It is important to track the exact reasoning employed by the Commission in its decision to overrule *WCBS-TV*. The Commission did *not* contend that standard product promotions do not implicitly raise the issue of the product's desirability. Rather, it concludes that mere promotion of a controversial product (that is, a product the use or purchase of which is controversial) does not constitute "meaningful" advocacy with respect to the merits of a "controversial issue of public importance," *Fairness Report* at 25. Petitioners contend that the Commission has thus arbitrarily excluded from the operation of the fairness doctrine one type of controversial issue: product desirability.

Given the reasons that the Commission puts forth for its new policy, such an outright fairness doctrine exemption for product commercials would not be arbitrary or an abuse of discretion. However, we are not convinced that petitioners' contention even correctly states what the Commission has done. When read in conjunction with that portion of the *Report* dealing with overt editorial and institutional advertising, the Commission's conclusion with respect to standard product commercials is more aptly characterized as being based on the view that the ultimate controversial issue of public importance is not the desirability of the product but the issues raised in the debate over desirability. Merely advocating the use of a product does not present information or involve discussion of these

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[66] Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

underlying issues; that is, promotional presentations are not "meaningful discussion[s] of . . . controversial issue[s] of public importance." When read in this manner, the *Fairness Report* has not arbitrarily excluded one class of issues from operation of the fairness doctrine; it has rather stated one standard for fairness doctrine application, quoted above, and refined and reformulated the definition of a controversial issue of public importance.

In any event, we think that the Commission has adequately supported its decision to exclude standard product commercials from the scope of the fairness doctrine. Three major arguments are presented by the Commission. First, the Commission made the judgment that the *WCBS-TV* approach to the fairness doctrine and standard product commercials at most informed the public about only one side of a controversial issue.[57] Since the underlying purpose of the fairness doctrine is to contribute to an informed public opinion,[58] the Commission determined that a change from the *WCBS-TV* approach was called for.

Certainly it must be admitted that counter-commercials are of a very different genre than are the product commercials themselves. They do not simply state, "Do not buy X; it is not desirable," but rather argue one side of the issues underlying the debate over desirability. Given this fundamental asymmetry, we do not think it was unreasonable for the Commission to conclude that application of the fairness doctrine to standard product commercials does not further the objective of presenting all viewpoints on controversial issues of public importance.[59]

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[57] "In the cigarette case, for example, the ads run by the industry did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health." *Fairness Report* at 25.

[58] *Report on Editorializing, supra* note 1, at 1249.

[59] The same arguments apply, albeit with less force, to institutional advertisements which do not overtly and obviously advocate one side of a controversial issue.

The second major argument put forth by the Commission is that application of the fairness doctrine to non-editorial advertisements would "divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion," *id.* at 26. This argument is of course premised to some extent on the first. We understand the Commission to be indicating that even if enforcement of fairness doctrine obligations with respect to commercial advertisements might marginally contribute to an informed public opinion, these benefits are outweighed by the reduction in public information which results from the decreased attention that broadcasters will afford to other aspects of the fairness doctrine. Given the wide range of controversial products to which the *WCBS-TV* approach could be applied [60] and the difficulties, discussed above, in determining which issues implicitly addressed give rise to fairness obligations, it is indeed quite possible that the effort broadcasters would have to devote to enforcing the fairness doctrine with respect to commercial advertisements would contribute relatively little to the overall objectives of the doctrine. We caution, however, that it is doubtful that the new FCC policy will substantially lessen the difficulties of drawing the line between advertisements which do and those do not incur fairness obligations. The difference between obvious and unobvious advocacy is not obvious.

Finally, the Commission suggested in the *Fairness Report*, though not in its arguments to this court, that application of the fairness doctrine to commercial adver-

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[60] *See* Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action* 85 (Rand Corp. 1973) ("There are relatively few advertised products whose normal use does not involve some significant issue: automobiles (large or small), gasoline (leaded or unleaded), any type of medication, beer, airplanes, any product that does not have a biodegradable container, any foreign product—the list is virtually endless.").

tisements could undermine the economic base of commercial broadcasting. It is possible that sponsors would be discouraged from broadcasting advertisements subject to mandatory counter-commercials, and that broadcasters could suffer additional losses through operation of the *Cullman* principle under which they must bear the cost of presenting opposing views where paid sponsorship is not available.[61] Yet no evidence has been presented which indicates that the *WCBS-TV* policy[62] had an adverse effect on commercial broadcasters, though admittedly this may be due to the rather unvigorous and confused enforcement of that policy. While we do not think this economic argument is conclusive standing alone,[63] the other two arguments put forth by the Commission provide adequate and substantial support for its decision.[64]

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[61] Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

[62] No generalizations can be drawn from the effect of the order in *WCBS-TV* itself, since that order applied to only one product. We do find it relevant, however, that apparently the cigarette manufacturers preferred a policy of no cigarette advertisements on television at all over the policy of requiring anti-smoking commercials, *see Capitol Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 588 (D.D.C. 1971) (Wright, J., dissenting). This supports the suggestion in the *Fairness Report* that full enforcement of the WCBS-TV policy could undermine the economic base of current broadcasting system.

[63] The Commission apparently agrees. In its *Reconsideration Order supra* note 2, at 699, the FCC stated, "Clearly, however, the economic impact on the broadcast industry was only one of many factors contributing to our choice of policy, and that factor alone is not of such critical importance as to cause a change of policy."

[64] As additional support for our conclusion that the Commission's new policies with respect to commercial advertising are not unreasonable or arbitrary, we note that two respected students of the fairness doctrine and of FCC regulation generally have made substantially similar proposals. *See*

II

The FCC's decision to limit the applicability of the fairness doctrine lays upon it some obligation to consider carefully other serious suggestions that have been made to ensure sufficient and balanced coverage of important public issues. We conclude that two of the proposals rejected by the Commission in its *Fairness Report* and *Reconsideration Order* deserve further considerations at the agency level.

Both the Commission and reviewing courts have been acutely sensitive to the multiple dilemmas posed by government regulation of the broadcast media. First, there is the recognition that given the scarcity of broadcast channels, it is not possible that all who desire to speak through these media will be able to do so. A limitation both on the number of broadcast licensees and on the number of viewpoints and topics covered is unavoidable.[65] It is further recognized that these limitations should be fashioned in a way that best furthers the interest of the public in receiving various viewpoints on important issues.[66] Inevitably this requires at least some government oversight of broadcasters' decisions as to which issues are covered. Enunciation and enforcement of the fairness doctrine is of course the primary mechanism employed by the FCC to accomplish this oversight. The Commission has chosen to rely primarily on third-party complaints and limited review of

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Geller, *supra* note 60; Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 HARV. L. REV. 768 (1973).

[65] *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943); *CBS v. DNC, supra.*

[66] *See Report on Editorializing, supra* note 1; Section 315(a) of the Communications Act, 47 U.S.C. § 315(a) (1970) (requiring a "reasonable opportunity for the discussion of conflicting views on issues of public importance").

fairness doctrine decisions by individual broadcasters in order to avoid excessive governmental supervision of licensee operations. *Fairness Report* at 8.

Yet case-by-case, issue-by-issue enforcement of the second obligation of the fairness doctrine still requires considerable Commission intrusion into the licensee decision-making process. *Id.* at 10-11. At the same time, reliance on third party complaints means that many fairness violations will not be called to account with respect to both part one and part two obligations.[67]

The Commission procedures with respect to part two complaints are spelled out in the *Fairness Report*. The complainant must describe the station, issue, and program involved, and must also "state his reasons for concluding that in its other programming the station has not presented contrasting views on the issue." *Id.* at 19. An unavoidable consequence of these procedures is that complaints will not be received, or will not be acted upon, unless there exist persons or organizations who are simultaneously "regular" viewers or listeners of the relevant station,[68] aware that there exist opposing points of view to that presented by the station, and interested enough in having those opposing views aired that they are willing to initiate a Commission inquiry into the matter.

The potential for less than full enforcement of the first obligation under the fairness doctrine—provision of "a reasonable amount of time for the presentation . . . of

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[67] For a description of these obligations, *see* p. 8 & n.13 *supra*.

[68] *See Fairness Report* at 19 (complainants must state reasons for concluding that station has not presented contrasting views; complainants thus must "specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience").

programs devoted to the discussion and consideration of public issues" [69]—is even greater. Given the Commission's view that it is rare that a particular issue is "of such great public importance that it would be unreasonable for a licensee to ignore [it] completely," *id.* at 10, there exists very little incentive for members of the public, whom we may conclude are vitally concerned with a limited number of public issues, to initiate complaints relating to the first fairness obligation. A citizen would almost have to consider himself a guardian of the general public interest in being informed in order successfully to initiate such a complaint. Thus, it is not surprising that the usual fairness complaint relates to the part two obligation, *id.* at 8.[70]

The Commission received three major proposals designed to overcome these difficulties of current fairness doctrine enforcement.[71] Petitioner COM urged that the Commission

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[69] *Id.* at 9, quoting *Report on Editorializing, supra* note 1, at 1244.

[70] *See generally* Comment, Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine, 10 HARV. C.R.C.L. L. REV. 127 (1975).

[71] Commission rejection of certain other proposals is also objected to on this appeal. We affirm the Commission's actions on these proposals. Petitioner NCCB asserts that there is a constitutional right of access for counter-commercials, arguing that the *CBS v. DNC* rationale for denying an access right for controversial speech is inapplicable because the latter speech is covered by the fairness doctrine. However, we are not convinced that the holding in *CBS v. DNC* was premised on the specifics of the fairness doctrine. Certainly there is no guarantee under that doctrine that the particular message denied broadcast under paid access will be presented as part of fairness obligations. In any event, we fail to see how individuals seeking to present uncontroversial messages could have constitutional protection not afforded to individuals seeking to present controversial speech.

Intervenor Geller requested that the Commission require broadcasters to "consider" all editorial advertisements, be-

adopt as an optional substitute for the current fairness doctrine a system whereby licensees devote a specified percentage of their broadcast time to what COM labeled "free speech messages" and other public issue programing. Intervenor Geller requested the Commission to adopt a requirement "that the licensee list annually the ten controversial issues of public importance, local and national, which it chose for coverage in the prior year."[73] Mr. Geller also proposed that the Commission confine review of fairness doctrine complaints to the time of license renewal.

A. *The COM Access Proposal*

The *Fairness Report* stated that the fairness inquiry did not disclose "any scheme of government-dictated access which we consider 'both practicable and desirable.'" The Commission concluded that (1) a system of paid access would favor wealthy spokesmen, (2) a system of first-come, first-served free access would "give no assurance that the most important issues would be discussed on a timely basis," and (3) any alternative system of free access would inevitably require the FCC to determine who should be allowed on the air. *Fairness Report* at 28-29 & n.29.

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cause, according to Mr. Geller, "many broadcasters now pursue . . . a flat ban on any advertisement dealing with a controversial issue." Geller Brief at 36. The Commission gave this proposal "serious thought" but concluded that it was not practicable, *Fairness Report* at 29. The Commission's concern that this rule would cause unwarranted Commission intrusion into licensees' broadcast decisions is ample support for its conclusion. Intervenor Geller also seeks to have the Commission modify its current policies, as set out in the *Fairness Report* and *Reconsideration Order*, with respect to news slanting and political editorializing. We find no basis upon which to upset the Commission's policies in these areas.

[73] Brief of Henry Geller at 33.

After the *Report* was issued, COM petitioned the Commission to reconsider or clarify its position with respect to right-to-access policies voluntarily adopted by licensees. In its petition, COM proposed a specific access scheme, not presented to the Commission during the fairness inquiry itself, which would be deemed presumptive compliance with the fairness doctrine. Under the scheme suggested by COM:

> 1) A licensee would set aside one hour per week for spot announcements and lengthier programing which would be available for presentation of messages by members of the public.
>
> 2) Half of this time would be allocated on a first-come, first-served basis on any topic whatsoever; the other half would be apportioned "on a representative spokesperson system."
>
> 3) Both parts of the allocation scheme would be "nondiscretionary as to content with the licensee."
>
> 4) However, the broadcaster would still be required to ensure that spot messages or other forms of response to "editorial advertisements" are broadcast.

See J.A. at 421-22.

The Commission addressed COM's proposal in its order denying reconsideration, stating that while the proposal was "the first serious attempt to meet" what the Commission deemed the essential requirements of any access scheme, "[i]t is neither perfected nor ready for adoption as a rule or policy." *Reconsideration Order* at 699. The Commission also expressed the view that the COM system could be a supplement to, but not a substitute for, the current fairness doctrine requirements. *Id.*

We recognize that the Commission is not required in informal rulemaking to consider exhaustively every idea put forth or to explain in detail the reasons that certain alternatives were rejected, *see Consumers Union of the*

United States, Inc. v. Consumer Product Safety Commission, 491 F.2d 810, 812 (2d Cir. 1974). Nevertheless, we think that the COM proposal has desirable aspects that the Commission may have overlooked, and indeed that the Commission may not have correctly understood the true nature of the proposal. In these circumstances, we conclude that the Commission should give further consideration to the proposal, including the solicitation of comments thereon.

Our conclusions are prompted by the Commission's own criteria for what would constitute an acceptable "optional access system to be administered by the licensee, and supplemented by the fairness doctrine:"

> The essential requirements for any such system would be that [1] licensee discretion be preserved and [2] no right of access accrue to particular persons or groups. Furthermore, [3] the access system would not be permitted to allow important issues to escape timely public discussion. Most importantly, [4] the system must not draw the government into the role of deciding who should be allowed on the air and when.

Reconsideration Order at 699.

First, it seems to us that the Commission has not explained adequately why the COM proposal does not meet most of these requirements. The fourth requirement would be furthered even more than it is under present fairness doctrine enforcement, since under the COM proposal the licensee would be subject to fairness complaints only with respect to "editorial advertisements." The nondiscretionary apportionment system in the COM proposal would appear to be responsive to the second requirement listed above. COM vigorously argues that the third requirement would be met because spokesmen will inevitably come forth to speak on important issues.[73]

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[73] Brief of COM at 35. COM also points out that "under the present system, there is no assurance or requirement that

The first FCC requirement is that "licensee discretion be preserved." COM argues that its proposal assures licensee discretion in that the licensee can decide not to adopt the access system and instead continue to operate under current fairness doctrine procedures. COM Brief at 43. But of course the discretion to which the Commission is referring is with respect to deciding which issues should be covered initially and which initial coverage requires the presentation of opposing points of view.

The Commission evidently bases this requirement on language in *CBS v. DNC*, *supra* at 125, that "the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many."[74] However, while the Court did state that " 'public trustee' broadcasting" should not be exchanged "for a system of self-appointed editorial commentators," *id.* at 125, it also stated that there might be devised "some kind of limited right of access that is both practicable and desirable," *id.* at 131. We cannot read *CBS v. DNC*—which held that broadcasters were not statutorily or constitutionally *required* to accept paid editorial messages—as indicating that voluntarily licensee adoption of a system of limited access such as that proposed by COM would violate the public interest standard of the Communications Act.[75] The COM proposal is of course not aptly characterized as

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once an offer of reply time is made, a contrasting viewpoint will actually be aired, if responsible spokespeople chose not to accept the offer." *Id.* We further note that where there is offered an opportunity to speak on an issue, but no one takes advantage of the opportunity, it is highly doubtful that the issues could qualify as one of importance.

[74] The opinion in *CBS v. DNC* also states:

> For better or worse, editing is what editors are for; and editing is selection and choice of material.

412 U.S. at 124.

[75] *See* note 66 *supra*.

solely "a system of self-appointed editorial commentators," because it would retain the broadcaster's present responsibility to present opposing points of view in response to editorial advertisements.

Moreover, in stating its "essential requirements" for an access system as a substitute for the current fairness doctrine, the Commission appears to want to have its cake and eat it too. If the preservation of journalistic "discretion" under the first requirement is meant to mandate that all decisions with respect to which issues are covered be left to the licensee, then substantial government involvement in the form of agency oversight, contrary to the spirit if not the letter of the fourth requirement, cannot be avoided. We do not think that the Commission has demonstrated in the *Fairness Report*, in the *Reconsideration Order*, or in its written and oral arguments to this court that the COM proposal retains insufficient licensee discretion.

Nor do the Commission's stated requirements take into account all crucial elements of an access scheme, or indeed any other mechanism of fairness doctrine enforcement. Certainly, the "essential requirements" must include some consideration of the scheme's likely success in meeting the first obligation of the fairness doctrine: the coverage of controversial issues. We have already described the limited extent to which current enforcement procedures can assure that this obligation is fulfilled, and we understand the reluctance of the Commission to become more involved in dictating which issues must be covered under the obligation. COM's proposal will involve the Commission even less than do present procedures in overseeing compliance with the first obligation. At the same time, the proposal would ensure a minimum amount of coverage of public issues.

Similarly, we think that the Commission cannot ignore the advantage of an access system in providing informa-

tion to the public which would not be provided under even full compliance with both obligations of the fairness doctrine as currently implemented. For instance, we have sustained the Commission's decision to exclude standard product commercials from the part two fairness obligation. Although we have determined that presentation of counter-commercials is not required by the public interest standard of the Communications Act, neither the Commission's decision nor our affirmance of it was based on the view that the information contained in counter-commercials is useless or harmful. Allowing presentation of these messages would certainly not be inconsistent with the Commission's statutory obligations. The only reservation about the utility of counter-commercials stated in the *Fairness Report* and *Reconsideration Order* was that they would present only one side of controversial issues of public importance.[76] But an access system could result in presentation of information opposing the purchase of certain products *and* messages opposing these counter-commercials.

We recognize, of course, that there may be significant difficulties with the COM access proposal. For instance, there is no absolute assurance that the issues addressed during access time will be the most important or controversial issues facing the licensee's community, and even less assurance of balance in presentation of opposing viewpoints. In its further inquiry into the COM proposal, we expect the Commission to ascertain how serious these potential defects are and to examine whether they can be overcome. Throughout this process, it is especially important that the nature and scope of issue coverage under the proposed access scheme be compared to the degree of coverage actually achieved under the current system of fairness doctrine implementation, not

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[76] *Fairness Report* at 25; *Reconsideration Order, supra* note 2, at 698.

to the coverage that would be achieved were both fairness obligations currently complied with and enforced.

B. *Other Proposals Relating to the First Fairness Obligation*

In conducting further inquiry on the COM proposal, the Commission will have to examine how best to ensure that licensees devote a reasonable amount of time to programing on public issues, as is required under the first obligation under the fairness doctrine. We do not think that this examination should be limited to comparison of only two alternatives: present procedures for implementing this obligation, on the one hand, and the COM proposal, on the other. There may well exist other ways of achieving compliance with the first obligation that deserve critical consideration, either in conjunction with, or as alternatives to, the procedures referred to above.

One of the proposals submitted to the Commission during the fairness inquiry seems especially promising as one step toward fuller compliance with the first fairness obligation. Intervenor Geller suggests that

> the licensee list annually the ten controversial issues of public importance, local and national, which it chose for the most coverage in the prior year, set out the offers for response made; and note representative programing that was presented on each issue.[77]

Mr. Geller made this proposal both during the fairness doctrine inquiry and in his petition for reconsideration of the *Fairness Report*.[78] There is no indication that this rather modest proposal has received the serious consideration it deserves. Although the Commission alluded to the proposal in its order denying reconsideration, it

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[77] Brief of Henry Geller at 33.

[78] *See* J.A. at 469-472.

failed to state even in conclusory terms why the proposal was being rejected. Therefore, we conclude that further inquiry into the Geller proposal would be appropriate as part of, or as a supplement to, additional examination of the COM access scheme.

Mr. Geller failed to state exactly what he believed the Commission should do with the issue reports that it receives, and it is not our role to flesh out the details of this proposal. It does seem to us, however, that issue reports could be useful to the Commission in one or more ways. For instance, the Commission initially could review each annual list to determine whether it appears that the licensee fulfilled his part one obligation. If this is not obvious from the list, or if the Commission had received complaints concerning the overall issue coverage afforded by the licensee, the Commission might conduct further inquiry into the licensee's issue coverage. Alternatively the Commission might take no immediate action with respect to the annual reports, but instead examine them at the time of license renewal. We leave it to the Commission's further examination to consider whether these or other uses of annual reports such as those proposed by Mr. Geller would be appropriate in enforcement of the fairness doctrine. The Commission may find it necessary to consider also under what standard the annual reports might be reviewed. We likewise leave to the Commission the determination of how best to conduct further inquiry into Mr. Geller's proposal, including whether this inquiry should be conducted separately from or as part of the further inquiry into the COM proposal.

C. *Review at Renewal Only*

Under a wholly separate proposal put forth by intervenor Geller, both during the fairness inquiry and in his petition for reconsideration, the FCC would abandon

its current case-by-case consideration of fairness doctrine complaints, and return to its pre-1962 practice of ascertaining at renewal time whether or not the licensee has complied with the fairness doctrine.[79] The proposal further suggests that the standard of review at renewal time be limited to whether there is "an indicated pattern of a flagrant nature, akin to 'malice' or bad faith or 'reckless disregard' of fairness obligations." Brief of Henry Geller at 11-12.

This proposal is directed at reducing the amount of government interference in the everyday editorial decisions of licensees. This objective was a major consideration in the decision in *CBS v. DNC*, *supra*, which held that there exists no statutorily or constitutionally mandated right of access for paid editorial broadcasts. But we think that intervenor errs in inferring from isolated language in that decision[80] that the case-by-case determinations made by the FCC under current procedures for fairness doctrine enforcement are invalid under the Communications Act and under the Constitution. If the Court in *CBS v. DNC* had intended to invalidate all case-by-case procedures employed by the FCC, it is un-

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[79] This change in practice was effected first with respect to cases involving personal attacks, *see* Tri-State Broadcasting Co., 40 F.C.C. 508 (1962).

[80] 412 U.S. at 126-27 ("Under . . . [the] right-of-access system urged by respondents . . . , the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether . . . a particular viewpoint has already been sufficiently aired"); *id.* at 125 ("It was reasonable for Congress to conclude that the public interest in being informed requires *periodic* accountability as the part of [broadcasters]."") (emphasis added); *id.* at 120 (the "unmistakable Congressional purpose [is] to maintain . . . essentially private broadcast journalism held only *broadly accountable to public interest standards.*") (emphasis added) (opinion of Burger, C.J.).

likely that it would have reaffirmed *Red Lion*, *supra*, decided by the Commission in just this manner, without at least mentioning its disapproval of the manner in which that case had come before it.[81]

We therefore conclude that the Commission is neither constitutionally nor statutorily *required* to return to its pre-1962 method of fairness doctrine enforcement. Nor do we think that its rejection of the proposal that it do so was unreasonable or arbitrary. It is not contended that the Commission failed to give the proposal serious consideration.[82] The Commission concluded that the proposed renewal assessment could not be made without inquiring into individual complaints, inquiries which would often be made on the basis of stale records. The Commission also argued—we believe convincingly—that review only at the time of renewal would discourage the filing of specific complaints from persons who sought to present opposing views in a timely fashion, and would deny the Commission the ability "to remedy violations before a flagrant pattern of abuse develops," *Fairness Report* at 18. In light of these considerations, we think the Commission correctly concluded that the specific renewal-only approach set forth by intervenor is not practicable at this time.

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[81] *Red Lion* did not sustain the Commission's fairness doctrine procedures. Although the Court upheld the fairness doctrine and the Commission's finding of a violation in that case, it did not have occasion to rule on the validity of the process by which the licensee before it was found to have violated the doctrine. *See* National Broadcasting Co. v. FCC [Pensions], 516 F.2d 1101, 1116 (D.C. Cir. 1974), *vacated as moot*, *id.* at 1180 (1975), *cert. denied*, 424 U.S. 910 (1976).

[82] As previously stated, "[Mr. Geller's] position is a serious one, and it deserves serious consideration." *Pensions*, *supra* at 1116. The Commission explained the proposal and the reasons for its rejection in both the *Fairness Report* (at 18) and the *Reconsideration Order* (*supra* note 2, at 693-94).

IV

In summary, we reject the challenges to the Commission's decision to exempt product commercials which do not "obviously and meaningfully address a controversial issue of public importance" from fairness doctrine obligations, and find no merit in the contentions that the Commission has violated the substantive and procedural requirements of NEPA. We also affirm the Commission's decisions to continue its policy of case-by-case consideration of fairness complaints and its policies relating to licensee consideration of editorial advertisements, news slanting and political editorializing. However, we remand the orders reviewed on this appeal with instructions that the Commission undertake further inquiry into petitioner COM's access proposal and intervenor Geller's "10 issue" proposal in accordance with this opinion.

It is so ordered.

APPENDIX B

FCC 74-702

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST STANDARDS OF THE COMMUNICATIONS ACT	Docket No. 19260

FAIRNESS REPORT

(Adopted June 27, 1974; Released July 12, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A SEPARATE STATEMENT; COMMISSIONER QUELLO CONCURRING AND ISSUING A SEPARATE STATEMENT.

I. INTRODUCTION

1. By Notice issued June 11, 1971 (Docket No. 19260, 30 FCC 2d 26), we instituted a broad-ranging inquiry into the efficacy of the fairness doctrine and related public interest policies. Observing that almost 22 years had passed since we last gave comprehensive consideration to the fairness doctrine,[1] we stated that the time had come for a reassessment and clarification of basic policy. While we noted that in view of Sections 315(a) and 3(h) of the Communications Act, the Commission could not "abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers," we did emphasize that these statutory standards were broad in nature and that therefore "there can and must be considerable leeway in both policy formulation and application in specific cases." In this regard, we asked that interested parties formulate their specific comments in light of two general but fundamental considerations of Commission policy. First, in view of the profound, unquestioned national commitment embodied in the Frst Amendment, our goal in this area must be to foster "uninhibited, robust, wide-open" debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Our inquiry was therefore directed in primary part to the question of whether the Commission's application of the doctrine has indeed been consistent with that goal and has promoted it to the maximum extent. Secondly, we also stressed that any promotion of this objective must be compatible with the public interest in "the larger and more effective use of radio." 47 U.S.C. Section 303(g). Noting that

[1] The Commission's first general statement on fairness doctrine principles was set forth in the *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). Briefly stated, "the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111 (1973) (hereinafter cited as *BEM*).

". . . to a major extent, ours is a commercially-based broadcast system and that this system renders a vital service to the nation," we emphasized that "[a]ny policies adopted by this Commission . . . should be consistent with the maintenance and growth of that system and should, among other appropriate standards, be so measured." These basic policy considerations have led the Commission to initiate this inquiry and have continued to guide us in the review and reformulation of the fairness doctrine set forth in this Report.

2. To facilitate consideration of the many complex problems involved, we divided the inquiry into four parts, entitled: II. The Fairness Doctrine Generally; III. Application of the Fairness Doctrine to the Broadcast of Paid Announcements; IV. Access Generally to the Broadcast Media for the Discussion of Public Issues; and V. Application of the Fairness Doctrine to Political Broadcasts.[2] Interested parties were invited to comment on any issue or aspect of these subjects. We have received and reviewed the written comments of numerous parties representing the advertising and broadcasting industries, labor unions, public interest, environmental and consumer groups, law schools, and other interested individuals and organizations.[3] Finally, in March 1972, we devoted a full week to panel discussions and oral arguments on the issues raised in this inquiry. Some fifty persons participated in the panel discussions and about thirty additional persons presented oral argument to the Commission. While this Report does not specifically address every suggestion which has been raised in the proceeding, we have given them all careful consideration in reaching the conclusions and policy judgments set forth herein.

II. THE FAIRNESS DOCTRINE GENERALLY

A. Broadcasting and Free Speech

3. We believe that it is appropriate to begin our evaluation of the fairness doctrine with a consideration of the underlying purposes of the doctrine and its relationship to freedom of speech. In 1949, we set forth the basic premises of the doctrine in these terms:

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the com-

[2] The Commission's *First Report—Handling of Political Broadcast*, 36 FCC 2d 40 (1972), was issued on June 22, 1972, and dealt with the issues raised in Part V of the inquiry. A copy of this First Report is attached hereto as Appendix A. We expedited consideration of this portion of the inquiry in order to clarify and treat the major questions presented therein prior to the 1972 general election campaign period. We believe, however, that it is desirable in the context of this Report to supplement our treatment of the political fairness issues discussed in our *First Report*.

[3] A list of major contributors can be found in Appendix B. Some submitting comments after filing deadlines may not be included therein. Over 20 parties filed comments and/or replies in Part II; over 40 parties filed in Part III (an additional 71 comments were received in response to the statement of the Federal Trade Commission in Part III); more than 30 comments were filed in Part IV; and approximately 15 comments in Part V.

munity. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting. *Report on Editorializing*, 13 FCC 1246, 1249 (1949).

4. At first appearance, this affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control. Throughout most of our history, the principal function of the First Amendment has been to protect the free marketplace of ideas by precluding governmental intrusion. However, the continuing evolution of the media of mass communications—both technologically and in terms of concentration of control—has led gradually to a different approach to the First Amendment. This approach—an affirmative one—recognizes the responsibility of government in maintaining and enhancing a system of freedom of expression. See generally T. Emerson, *The System of Freedom of Expression*, chapter XVII (1970).

5. In the 1949 *Report on Editorializing*, the Commission expressed the view that a requirement that broadcast licensees present contrasting views on public issues was "within both the spirit and letter of the first amendment." 13 FCC at 1956. This conclusion was based, in large measure, on the decision of the Supreme Court in *Associated Press* v. *United States*, 326 U.S. 1 (1945), which concerned anti-competitive practices in the newspaper industry. In that decision, the Court emphasized the affirmative aspects of the First Amendment:

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. 326 U.S. at 20.

6. In the field of broadcasting, the principal impediment to free expression arises not from any anti-competitive practices, but from the physical characteristics of the medium itself. Practical experience in the early years of radio made it obvious that a complete laissez-faire policy on the part of the government would lead to the destruction of effective radio communication and, thus to a frustration of the basic goals of the First Amendment. For a brief period during the nineteen twenties, government regulation of broadcasting was virtually non-existent, and broadcasters had the same freedom of action traditionally afforded the publishers of newspapers or magazines. The underlying policy was that "anyone who will may transmit." 67 Cong. Rec. 5479 (1926) (remarks of Congressman White). The results of this system were disastrous both for the broadcasting industry and for the listening public:

> From July 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927 almost 200 new radio stations went on the air. These new stations used any frequency they desired, regardless of the interference thereby caused to

others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. FCC Office of Network Study, *Second Interim Report on Television Network Procurement*, 65–66 (1965).

7. In 1927, Congress acted to end the crisis by establishing an effective system of government licensing. It would have been unthinkable, of course, for the government to have been in the business of deciding who could publish newspapers and magazines and who could not. In purely practical terms, however, it was obvious that licensing was essential to the development of an effective system of broadcasting. In the case of *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the Supreme Court concluded that, because of the scarcity of available frequencies, the licensing system established by Congress did not violate the First Amendment. In an opinion written by Justice Frankfurter, the Court found that the freedom of speech did not include "the right to use the facilities of radio without a license." *Id.* at 227. It made it clear, furthermore, that the Commission was not limited to the role of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." *Id.* at 215. "[T]he Act," the Court held, "does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the compositon of that traffic." *Id.* at 215–16. But, while the *NBC* case did establish an expansive view of Commission powers, it still left a great many First Amendment questions unanswered.

8. Some twenty-six years later, in the landmark decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court set forth a comprehensive First Amendment theory which vindicated both the licensing system and the Commission's fairness doctrine. Justice White, writing for a unanimous Court, reaffirmed Justice Frankfurter's thesis that because of the scarcity factor, licensing was permissible.[4] The First Amendment, in the Court's opinion, did not confer upon anyone the right to operate a radio station:

> [I]f there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum *Id.* at 389.

It was thus concluded that the basic purposes of the First Amendment would be undermined if there were "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

9. While the licensing system was thus designed to further First Amendment interests in the broadcast medium, it was necessary to define those interests and identify their focus and means of implementation.[5] Should the licensees chosen by the government be accorded an

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[4] This scarcity principle is not predicated upon a comparison between the number of broadcast stations and the number of daily newspapers in a given market. The true measure of scarcity is in terms of the number of persons who wish to broadcast and, in Justice White's language, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate." 395 U.S. at 388.

[5] Professor Emerson has outlined this problem in the following terms: "[o]nce it is assumed that a scarcity of broadcasting facilities exists the next question becomes, what follows from that?. . . . In purely common-sense terms it would seem to follow that, if

absolute and unrestricted right to advance their own views to the exclusion of those of their less privileged fellow citizens? Or should there be some provision made to insure the recognition of the First Amendment interests of those citizens who are of necessity denied the opportunity to operate a broadcasting station? In language strikingly close to that found in our earlier *Report on Editorializing*, the *Red Lion* Court stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390. While private businessmen were licensed to operate radio stations, "[t]he people as a whole retain their interest in free speech by radio and their *collective right to have the medium function consistently with the ends and purpose of the First Amendment.*" *Ibid.* (emphasis supplied). That Amendment, as it has long been recognized, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). In this respect, the purpose of the First Amendment is not simply to protect the speech of particular individuals, but rather to preserve and promote the informed public opinion which is necessary for the continued vitality of our democratic society and institutions. As the Supreme Court has elsewhere stated, "speech concerning public affairs is more than self-expression: it is the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74–5 (1964), and "[t]hose guarantees [of the First Amendment] are not for the benefit of the press so much as for the benefit of all of us." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1966).

10. In light of this fundamental purpose of the First Amendment and the paramount right of the public to have that purpose implemented in the broadcast medium, it became clear that the license granted by the government to a chosen few could not be considered as a privilege to "ignore the problems which beset the people or . . . exclude from the airways anything but their own views of fundamental questions." 395 U.S. at 394. As the *Red Lion* Court stated, "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government had denied others the right to use." 395 U.S. at 391. Rather, the constitutional status of the broadcast licensee was identified in the following terms:

> [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. *Id.* at 389.

11. Thus, in the context of the scarcity of broadcast frequencies and the resulting necessity for government licensing, the First Amendment impels, rather than prohibits, governmental promotion of a system which will ensure that the public will be informed of the important

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the government must choose among applicants for the same facilities, it should choose on some sensible basis. The only sensible basis is the one that best promotes the system of freedom of expression." T. Emerson, *The System of Freedom of Expression* 663 (1970).

issues which confront it and of the competing viewpoints on those issues which may differ from the views held by a particular licensee. The purpose and foundation of the fairness doctrine is therefore that of the First Amendment itself: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." 395 U.S. at 390. In accordance with this view and theory, the Court in *Red Lion* held that

> It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. 395 U.S. at 394.

12. That the government should act affirmatively to preserve and promote the greater listening and viewing public's First Amendment interests in broadcasting is a concept which some quarters still find difficult to accept. But while arguments have been and will continue to be made as to the wisdom of the fairness doctrine and its application in particular cases, its statutory support[4] and constitutionality are firmly established. *BEM*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

13. Although the legality of the fairness doctrine is thus well-established, Chief Judge Bazelon of the District of Columbia Circuit has suggested that the time has come for "the Commission to draw back and consider whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances. . . ." *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 80 (D.C. Cir. 1972) (dissenting opinion). We believe, however, that the problem of scarcity is still very much with us, and that despite recent advances in technology, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 388. The effective development of an electronic medium with an abundance of channels (through the use of cable, or otherwise) is still very much a thing of the future. For the present, we do not believe that it would be appropriate—or even permissible—for a government agency charged with the allocation of the channels now available to ignore the legitimate First Amendment interests of the general public. We recognize, however, that there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's legitimate First Amendment interests. It is with a real sensitivity to this potential danger and an equal aware-

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[4] From the earliest days of radio regulation, it was recognized that a standard of fairness was an essential element of regulation in the "public interest." *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 59 App. D.C. 197, 37 F. 2d 993, cert. dismissed, 281 U.S. 706 (1930). In 1959, Congress specifically amended the Communications Act so as to vindicate the Commission's view that fairness inhered in the general public interest standard of the Act. 47 U.S.C. Section 315(a); see *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 380–81.

ness of our responsibilities to promote the ends and purposes of the First Amendment that we have confronted the task of restating and reformulating our approach to the fairness doctrine and the broadcasters' obligations thereunder.[7]

B. Does the Fairness Doctrine Inhibit Broadcast Journalism?

14. A number of commentators have argued that, in spite of its worthy purposes, the actual effect of the fairness doctrine can only be to restrict and inhibit broadcast journalism. Far from inhibiting debate, however, we believe that the doctrine has done much to expand and enrich it.

15. We have already noted that, stripped to its barest essentials, the fairness doctrine involves a two-fold duty: (1) the broadcaster must devote a reasonable percentage of this broadcast time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view. It is impossible to believe that the first of these obligations could hamper broadcast news and commentary in any way. While such a requirement might be viewed as a restriction on the broadcaster as a businessman, there is no doubt that "it is a positive stimulus to broadcast journalism." Wood, *Electronic Journalism* 127 (1967).

16. We do not believe that the second part of the fairness doctrine should inhibit broadcast journalism any more than the first. It has frequently been suggested, however, that many broadcasters will avoid the coverage of controversial issues if they are required to present contrasting views. These broadcasters, it is argued, will find the opposing viewpoints too offensive, or their presentation too disruptive to their broadcast schedules, too expensive (assuming they are unable to find sponsorship for the presentation of contrasting views), or simply too much trouble. Our first response to this argument is that it represents an attitude which is completely inconsistent with the broadcaster's role as a public trustee.[8]

17. The Supreme Court in *Red Lion* considered the possibility that fairness principles might have a "chilling effect" on broadcast journalism, and found that this

possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this

[7] Judge Skelly Wright of the District of Columbia Circuit has made the following observations with regard to the difficulties inherent in fairness regulation: "The problems of figuring out the right thing to do in this area—the system that will best serve the public's First Amendment interest—are enormous. In some areas of the law, constitutional values are clearly discernible, as where one is required to balance some right protected by the Constitution against an asserted countervailing governmental interest. . . . [I]n some areas of the law it is easy to tell the good guys from the bad guys. In the current debate over the broadcast media and the First Amendment, however, each debater claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication." Commencement address, National Law Center, George Washington University, Washington, D.C., June 3, 1973.

[8] We concur with the views expressed on this subject by former Commissioner Cox several years ago: "[a]s a trustee for the public, a broadcaster must use his facilities to enlighten the public about the critical issues which it faces, and this obviously requires substantial effort and may involve presenting some viewpoints with which the licensee totally disagrees. But so long as he is permitted to express his own view editorially with respect to the matters discussed and is allowed to choose the formats to be employed and the spokesmen for the respective positions, he cannot, it seems to me, claim that his freedom to report and analyze the news has been impaired." Cox, *The FCC and the Future of Broadcast Journalism in Survey of Broadcast Journalism 1969–1970* at 115.

regard. It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect. 395 U.S. at 393.

In the years since *Red Lion* was decided, we have seen no credible evidence that our policies have in fact had "the net effect of reducing rather than enhancing the volume and quality of coverage."

18. In evaluating the possible inhibitory effect of the fairness doctrine, it is appropriate to consider the specifics of the doctrine and the procedures employed by the Commission in implementing it. When a licensee presents one side of a controversial issue, he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make a provision for the opposing views in his *overall programming*. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith.

19. As a matter of general procedure, we do not monitor broadcasts for possible violations, but act on the basis of complaints received from interested citizens. These complaints are not forwarded to the licensee for his comments unless they present *prima facie* evidence of a violation. *Allen C. Phelps*, 21 FCC 2d 12 (1969). Thus, broadcasters are not burdened with the task of answering idle or capricious complaints. By way of illustration, the Commission received some 2,400 fairness complaints in fiscal 1973, only 94 of which were forwarded to licensees for their comments.

20. While there may be occasional exceptions, we find it difficult to believe that these policies add significantly to the overall administrative burdens involved in operating a broadcast station. It is obvious that any form of governmental regulation will impose certain costs or burdens of administration on the industry affected. The point is not whether some burden is involved, but rather whether that burden is justified by the public interest objective embodied in the regulation. Broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public's paramount right to be informed, some administrative burdens must be imposed on the licensee in this area. These burdens simply "run with the territory." Furthermore, any licensee who might be discouraged by such a burden will have to take into account this Commission's requirement that he *must* provide a forum for the discussion of public issues. The Supreme Court has made it clear and it should be reemphasized here that "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393.

C. The Specifics of the Fairness Doctrine

21. In developing and implementing the fairness doctrine it has never been our intention to force licensees to conform to any single, preconceived notion of what constitutes the "ideal" in broadcast jour-

nalism. Our purpose has merely been to establish general guidelines concerning *minimal* standards of fairness. We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. *Fairness Doctrine Primer*, 40 FCC 598, 599 (1964). In this regard, we are still convinced that "there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." *Report on Editorializing*, 13 FCC 1246, 1251 (1949).

22. It is obvious that under this method of handling fairness, many questionable decisions by broadcast editors may go uncorrected. But, in our judgment, this approach represents the most appropriate way to achieve "robust, wide open debate" on the one hand, while avoiding "the dangers of censorship and pervasive supervision" by the government on the other. *Banzhaf* v. *FCC*, 405 F. 2d 1082, 1095 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969). In this respect, we are not unmindful of the dangers alluded to by the Court in *BEM:*

> Congress appears to have concluded . . . that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided. 412 U.S. 94 at 105.

We therefore recognize that reaching a determination as to what particular policies will best serve the public's right to be informed is a task of "great delicacy and difficulty," and that the Commission must continually walk a "tightrope" between saying too much and saying too little. *Id.* at 102, 117. However, we also believe that this Commission has a clear responsibility and obligation to assume this task.

1. Adequate Time for the Discussion of Public Issues

23. The first, and most basic, requirement of the fairness doctrine is that it establishes an "affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues. . . ." *Report on Editorializing*, 13 FCC at 1249. Determining what constitutes a "reasonable amount of time" is—like so many other programming questions—a responsibility of the individual broadcast licensee. It is the individual broadcaster who, after evaluating the needs of his particular community, "must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to other legitimate services of radio broadcasting. . . ." *Id.* at 1247.

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24. In reviewing the adequacy of the amount of a licensee's public issue programming, we will, of course, limit our inquiry to a determination of its reasonableness. We wish to make it plain, however, that we have allocated a very large share of the electromagnetic spectrum to broadcasting chiefly because of our belief that this medium can make a great contribution to an informed public opinion. See *Democratic National Committee*, 25 FCC 2d 216, 222 (1970). We are not prepared to allow this purpose to be frustrated by broadcasters who consistently ignore their public interest responsibilities. Indeed, "we regard strict adherence to the fairness doctrine"—including the affirmative obligation to provide coverage of issues of public importance—"as the single most important requirement of operation in the public interest—the '*sine qua non*' for grant of a renewal of license." *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292 (1970).

25. The individual broadcaster is also the person "who must select or be responsible for the selection of the particular news items to be reported or the particular local, state, national or international issues or questions of public interest to be considered. . . ." *Report on Editorializing*, 13 FCC at 1247.[9] We have, in the past, indicated that some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely. See *Gary Soucie* (Friends of the Earth), 24 FCC 2d 743, 750–51 (1970). But such statements on our part are the rare exception, not the rule, and we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.

26. We wish to emphasize that the responsibility for the selection of program material is that of the individual licensee. That responsibility "can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments." *Report on Editorializing*, 13 FCC at 1248. We believe that stations, in carrying out this responsibility, should be alert to the opportunity to complement network offerings with local programming on these issues, or with syndicated programming.

2. A Reasonable Opportunity for Opposing Viewpoints

27. The usual fairness complaint does not involve an allegation that the licensee has not devoted sufficient time to the discussion of public issues. Rather, it concerns a claim that the licensee has presented one viewpoint on a "controversial issue of public importance" and has failed to afford a "reasonable opportunity for the presentation of contrasting viewpoints."

28. It has frequently been suggested that individual stations should not be expected to present opposing points of view and that it should be sufficient for the licensee to demonstrate that the opposing view-

[9] Ordinarily, the problems which are identified by a station's ascertainment of its community's needs and interests would be featured prominantly in the list of public issues selected by the station for program coverage. See generally, *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 20 FCC 2d 880 (1971).

point has been adequately presented on another station in the market or in the print media. See *WSOC Broadcasting Co.*, 17 P & F Radio Reg. 548, 550 (1958). While we recognize that citizens receive information on public issues from a variety of sources, other considerations require the rejection of this suggestion. First, in amending section 315(a) of the Communications Act in 1959, Congress gave statutory approval to the fairness doctrine, including the requirement that broadcasters themselves provide an opportunity for opposing viewpoints. See *BEM*, 412 U.S. at 110, note 8.[10] Second, it would be an administrative nightmare for this Commission to attempt to review the overall coverage of an issue in all of the broadcast stations and publications in a given market. Third, and perhaps most importantly, we believe that the requirement that *each* station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view. The fairness doctrine will not insure perfect balance in debate and each station is not required to provide an "equal" opportunity for opposing views. Furthermore, since the fairness doctrine does not require balance in individual programs or series of programs, but only in a station's overall programming, there is no assurance that a listener who hears an initial presentation will also hear a rebuttal. Compare 47 U.S.C. 396(g)(1)(A). However, if all stations presenting programming relating to a controversial issue of public importance make an effort to round out their coverage with contrasting viewpoints, these various points of view will receive a much wider public dissemination. This requirement, of course, in no way prevents a station from presenting its own opinions in the strongest terms possible.

a. What is a "controversial issue of public importance"?

29. It has frequently been suggested that the Commission set forth comprehensive guidelines to aid interested parties in recognizing whether an issue is "controversial" and of "public importance." However, given the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases. For this very practical reason, and for the reason that our role must and should be limited to one of review, we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area.

30. Some general observations, however, are in order. First of all, it is obvious that an issue is not necessarily a matter of significant "public importance" merely because it has received broadcast or newspaper coverage. "Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues." *Healey* v. *FCC*, 460 F.2d 917, 922 (D.C. Cir. 1972). Nevertheless, the degree of media

[10] One United States Senator has proposed that it might be desirable to apply the fairness doctrine only where less than four broadcast signals are received in a given area. See 119 Cong. Rec. S20358–62 (November 14, 1973) (remarks of Senator Ervin). We believe that such a proposal is clearly beyond our statutory authority. However, it may be appropriate at some future date to examine the possibility of a different application of the fairness doctrine to new technologies of electronic communication or of a different application in broadcast markets of varying size.

coverage is one factor which clearly should be taken into account in determining an issue's importance. It is also appropriate to consider the degree of attention the issue has received from government officials and other community leaders. The principal test of public importance, however, is not the extent of media or governmental attention, but rather a subjective evaluation of the impact that the issue is likely to have on the community at large.[11] If the issue involves a social or political choice, the licensee might well ask himself whether the outcome of that choice will have a significant impact on society or its institutions. It appears to us that these judgments can be made only on a case-by-case basis.

31. The question of whether an issue is "controversial" may be determined in a somewhat more objective manner. Here, it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. The licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. It is possible, of course, that "programs initiated with no thought on the part of the licensee of their possible controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views." *Report on Editorializing*, 13 FCC at 1251. In such circumstances, it would be appropriate to make provision for opposing views when the opposition becomes manifest.

b. What specific issue has been raised?

32. One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the *specific* issue or issues raised by a particular program. This would seem to be a simple task, but in many cases it is not. Frequently, resolution of this problem can be of decisional importance. See, *e.g.*, *David C. Green*, 24 FCC 2d 171 (1970); *WCBS-TV*, 9 FCC 2d 921, 938 (1967).

33. This determination is complicated by the fact that it is frequently made without the benefit of a transcript or tape of the program giving rise to the complaint. Hence, it is necessary in such cases to rely on the recollections of station employees and listeners. While the availability of an accurate transcript would facilitate the determination of the issue or issues raised, it would not in many cases clearly point up those issues. This is true because a broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue. This problem may be illustrated by reference to a hypothetical broadcast which takes place during the course of a heated community debate over a school bond issue. The broadcast presents a spokesman who forcefully asserts that new school construction is urgently needed and that there is also a need for substantial increases in teachers' salaries, both principal arguments advanced by proponents of the bond issue. The spokesman, however, does not explicitly mention or advocate passage of the bond issue. In this case,

[11] In this regard, we note that the fairness doctrine was not designed for the purpose of providing a forum for the discussion of mere private disputes of no consequence to the general public. Rather, its purpose is to insure that the public will be adequately informed on matters of importance to major segments of the community.

the licensee would be faced with a need to determine whether the spokesman had raised the issue of whether the school bonds should be authorized (which is controversial), or whether he had merely raised the question of whether present school facilities and teacher salaries are adequate (which might not be at all controversial).

34. In answering this question, we would expect a licensee to exercise his good faith judgment as to whether the spokesman had in an obvious and meaningful fashion presented a position on the ultimate controversial issue of whether the school bond issue should be approved.[12] The licensee's inquiry should focus not on whether the statement bears some tangential relevance to the school bond question, but rather on whether that statement, in the context of the ongoing community debate, is so obviously and substantially related to the school bond issue as to amount to advocacy of a position on that question. If, for example, the arguments and views expressed over the air closely parallel the major arguments advanced by partisans on one side or the other of the public debate it might be reasonable to conclude that there had been a presentation on one side of the ultimate issue, i.e., authorization of the school bonds. Obviously, licensees in specific cases may differ in their answers to this inquiry. If a licensee's determination is *reasonable* and arrived at in good faith, however, we will not disturb it. *Cf.*, *Media Access Project* (Georgia Power), 44 FCC 2d 755 (1973).

35. Before leaving this subject, we wish to make it clear that a fairness response is not required as a result of offhand or insubstantial statements. As we have stated in the past, "[a] policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270)." *National Broadcasting Co.* (AOPA complaint), 25 FCC 2d 735, 736–37 (1970).

c. What is a "reasonable opportunity" for contrasting viewpoints?

36. As noted above, the Commission's first task in handling a typical fairness complaint is to review the licensee's determination as to whether the issue specified in the complaint or the Commission's inquiry has actually been raised in the licensee's programming. Secondly, we must review the licensee's determination of whether that issue is "controversial" and of "public importance." If these questions are answered in the affirmative, either by admission of the licensee or by our determination upon review, we must then determine whether the licensee has afforded a "reasonable opportunity" in his overall programming for the presentation of contrasting points of view.

37. The first point to be made with regard to the obligation to present contrasting views is that it cannot be met "merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time." *Report on Editorializing*, 13 FCC at 1251. The licensee has a duty to

[12] See discussion of the application of this standard to "editorial" advertising in Part III, *infra*.

play a conscious and positive role in encouraging the presentation of opposing viewpoints.[13] We do not believe, however, that it is necessary for the Commission to establish a formula for all broadcasters to follow in their efforts to find a spokesman for an opposing viewpoint. As we stated in *Mid-Florida Television Corp.*, 40 FCC 620 (1964):

> The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often combinations of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to such an individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue. Other licensees consult with community leaders as to who might be an appropriate individual or group for such a purpose. Still others announce at the beginning or ending (or both) of programs presenting opinions on controversial issues that opportunity will be made available for the expression of contrasting views upon request by responsible representatives of such views. *Id.* at 621.

If a licensee fails to present an opposing viewpoint on the ground that no appropriate spokesman is available, he should be prepared to demonstrate that he has made a diligent, good-faith effort to communicate to such potential spokesmen his willingness to present their views on the issue or issues presented. *Columbia Broadcasting System Inc.*, 34 FCC 2d 773 (1972). There may well be occasions, particularly in cases involving major issues discussed in depth, where such a showing should include specific offers of response time to appropriate individuals in addition to general over-the-air announcements.[14]

38. In making provision for the airing of contrasting viewpoints, the broadcasting should be alert to the possibility that a particular issue may involve more than two opposing viewpoints. Indeed, there may be several important viewpoints or shades of opinion which warrant broadcast coverage.[15]

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[13] This duty includes the obligation defined in *Cullman Broadcasting Co.*, 40 FCC 576, 577 (1963): "where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation." (emphasis in original).

We do not believe that the passage of time since *Cullman* was decided has in any way diminished the importance and necessity of this principle. If the public's right to be informed of the contrasting views on controversial issues is to be truly honored, broadcasters must provide the forum for the expression of those viewpoints at their own expense if paid sponsorship is unavailable.

[14] In a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 18859, 23 FCC 2d 27, we proposed the adoption of specific procedures to be followed under certain circumstances in seeking an opposition spokesman. We believe, however, that the policy set forth above adequately covers all situations, and consequently that it is now appropriate to terminate that proceeding.

[15] One student commentator has outlined this problem in the following terms: "A principle purpose of the fairness doctrine is to educate the public on the major alternatives available to it in making social choices. . . . Acknowledging that there is a 'spectrum' of opinion on many issues, it is nonetheless true that there are often clearly definable 'colors' in the spectrum, even though the points at which they blend into one another may be unclear. The controversy concerning American policy in Indochina is illustrative. The alternatives [prior to America's withdrawal from the war] include[d] increasing military activity, maintaining the [then] present level of commitment, a phased withdrawal and an immediate withdrawal. It might be argued that any licensee who does not present some coverage of at least these views has failed to educate the public about the major policy alternatives available." Note, *The FCC Fairness Doctrine and Informed Social Choice*, 8 Harv. J. Legis. 333, 351–52 (1971).

39. In deciding which viewpoints or shades of opinion are to be presented, licensees should employ a standard similar to that used to decide which political parties or candidates represent a viewpoint of sufficient importance to deserve coverage. As we stated in *Lawrence M. C. Smith*, 40 FCC 549 (1963), the broadcaster (in programs not covered by the "equal time" requirement of 47 U.S.C. Section 315) is not expected to present the views of all political parties no matter how small or insignificant, but rather:

> "the licensee would be called upon to make a good faith judgment as to whether there can reasonably be said to be a need or interest in the community calling for some provision of announcement time to these other parties or candidates and, if so, to determine the extent of that interest or need and the appropriate way to meet it." 40 FCC at 550.

In evaluating a "spectrum" of contrasting viewpoints on an issue, the licensee should make a good faith effort to identify the *major* viewpoints and shades of opinion being debated in the community, and to make a provision for their presentation. In many, or perhaps most, cases it may be possible to find that only two viewpoints are significant enough to warrant broadcast coverage.[16] However, other issues may involve a range of markedly different and important policy alternatives. In such circumstances, the broadcaster must make a determination as to which shades of opinion are of sufficient public importance to warrant coverage, and also the extent and nature of that coverage.

40. The question of the *reasonableness* of the opportunity for opposing viewpoints goes considerably deeper, however, than a mere finding that *some* provision has been made for the opposing viewpoints. Indeed, it has frequently been suggested that the wide discretion afforded the licensee in selecting a reply spokesman and format may undermine any possibility that treatment of the opposition view will be either reasonable or fair. Accordingly, it has been argued that the Commission should promulgate regulations establishing standards for the selection of an appropriate reply spokesman and format. We believe, however, that it should be adequate to remind licensees that they have a duty not " 'to stack the cards' by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other. . . ." *Report on Editorializing*, 13 FCC at 1253. In the final analysis, fairness must be achieved, "not by the exclusion of particular views because of . . . the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views *without deliberate restrictions designed to impede equally forceful presentation.*" *Id.* at 1253–54. (emphasis supplied); see also *Brandywine-Maine Line Radio, Inc.*, 24 FCC 2d 18, 23–24 (1970).

41. In providing for the coverage of opposing points of view, we believe that the licensee must make a reasonable allowance for presentations by genuine partisans who actually believe in what they are saying. The fairness doctrine does not permit the broadcaster "to pre-

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[16] This is not to say that a broadcaster is barred from presenting the views of small minorities, but only that the government will not *require* the coverage of every possible viewpoint or shade of opinion regardless of its significance.

side over a 'paternalistic' regime," *BEM*, 412 U.S. at 130, and it would clearly not be acceptable for the licensee to adopt a "policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner. . . ." *Democratic National Committee*, 25 FCC 2d 216, 222 (1970). Indeed, this point has received considerable emphasis from the Supreme Court:

> [N] or is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 392, n. 18, quoting J. S. Mill, *On Liberty* 32 (R. McCallum ed. 1947).

42. This does not mean, however, that the Commission intends to dictate the selection of a particular spokesman or a particular format, or indeed that partisan spokesmen must be presented in every instance. We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation. In cases involving personal attacks and political campaigns, the natural opposing spokesmen are relatively easy to identify. This is not the case, however, with the majority of public controversies. Ordinarily, there are a variety of spokesmen and formats which could reasonably be deemed to be appropriate. We believe that the public is best served by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation.

43. Frequently, the question of the reasonableness of the opportunity provided for contrasting viewpoints comes down to weighing the *time* allocated to each side. Aside from the field of political broadcasting, the licensee is not required to provide equal time for the various opposing points of view. Indeed, we have long felt that the basic goal of creating an informed citizenry would be frustrated if for every controversial item or presentation on a newscast or other broadcast the licensee had to offer equal time to the other side. Our reasons for granting the licensee broad discretion with respect to the amount or nature of time to be afforded can be summarized as follows:

> In our judgment, based on decades of experience in this field, this is the only sound way to proceed as a general policy. A contrary approach of equal opportunities, applying to controversial issues generally the specific equal opportunities requirements for political candidates would in practice not be workable. It would inhibit, rather than promote, the discussion and presentation of controversial issues in the various broadcast program formats (e.g., newcasts, interviews, documentaries). For it is just not practicable to require equality with respect to the large number of issues dealt with in a great variety of programs on a daily and continuing basis. Further, it would involve this Commission much too deeply in broadcast journalism; we would indeed become virtually a part of the broadcasting "fourth estate" overseeing thousands of complaints that some issue had not been given "equal treatment". We do not believe that the profound national commitment to the principle that debate on public issue should be "uninhibited, robust, wide-open" (*New York Times v. Sullivan*, 376 U.S. 254, 270) would be promoted by a general policy of requiring equal treatment on all such issues, with governmental intervention to insure such mathematical equality. *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292 (1970).

Similarly, we do not believe that it would be appropriate for this Commission to establish any other mathematical ratio, such as 3 to 1 or 4 to 1, to be applied in all cases. We believe that such an approach is much too mechanical in nature and that in many cases our pre-conceived ratios would prove to be far from reasonable. In the case of a 10-second personal attack, for example, fairness may dictate that more time be afforded to answer the attack than was given the attack itself. Moreover, were we to adopt a ratio for fairness programming, the "floor" thereby established might well become the "ceiling" for the treatment of issues by many stations, and such a ratio might also lead to preoccupation with a mathematical formula to the detriment of the substance of the debate. It appears to us, therefore, that no precise mathematical formula would be appropriate for all cases, and the licensee must exercise good faith and reasonableness in considering the particular facts and circumstances of each case.

44. While the road to predicting Commission decisions in this area is not fully and completely marked, there are, nevertheless, a number of signposts which should be recognizable to all concerned parties. We have made it clear, for example, that "it is patently unreasonable for a licensee consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time. Similarly, there can be an imbalance from the sheer weight on one side as against the other." *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d at 293. This imbalance might be a reflection of the total *amount of time* afforded to each side, of the *frequency* with which each side is presented, of the size of the listening *audience* during the various broadcasts, or of a combination of factors. It is incumbent upon a complainant to bring to the Commission's attention any specific factors which he believes point to a finding that fairness has not been achieved. From the standpoint of the licensee, however, the most important protection against arbitrary Commission rulings is the fact that we will not substitute our judgment for his. Our rulings are not based on a determination of whether we believe that the licensee has acted wisely or whether we would have proceeded as he did. Rather, we limit our inquiry to a determination of whether, in the light of all of the facts and circumstances presented, it is apparent that the licensee has acted in an arbitrary or unreasonable fashion.

45. The danger of an unwise Commission decision in this area is considerably reduced by the fact that no sanction is imposed on the broadcaster for isolated fairness violations during the course of the license term. The licensee is simply asked to make an additional provision for the opposing point of view, and this is certainly not too much to ask of a licensee who has been found to be negligent in meeting his fairness obligations. Indeed, it is to the benefit of both the licensee and his listening audience if broadcasters are informed of their fairness duties and given an opportunity to fulfill them on a timely basis.

D. The Complaint Procedure

46. It has sometimes been suggested that fairness complaints should not be considered at the time they are presented to the Commission, but with few exceptions should simply be placed in the station's license

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file to be reviewed in connection with its renewal application. This review would focus on the station's overall performance for the license period, and not on the specific facts of individual fairness violations. Some have argued that this approach would have two major advantages over present procedures. First, it might considerably reduce the Commission's administrative workload, since complaints would not be given any consideration unless there were a number of complaints against a single station which indicated a serious pattern of violations. Secondly, it has been suggested that by avoiding a detailed review of individual complaints the Commission would be able to insure that it did not become too deeply involved in the day-to-day operations of broadcast journalism.

47. After giving careful consideration to this proposal, we believe that our present procedure of reviewing complaints on an ongoing basis is preferable.[17] First, we do not believe it would be possible to make an "overall" assessment of licensee performance at renewal time without considering the specifics of individual complaints. It simply would not be possible to look at the bare complaints on file and make any knowledgable assessment of licensee performance. Secondly, we view consideration of fairness compliance only at renewal time as an inadequate safeguard of the public's paramount right to be informed and believe that we should continue our ongoing effort (through the complaint process) to advance the public's interests in receiving timely information on public issues. This, we believe, will provide an opportunity to remedy violations before a flagrant pattern of abuse develops. In addition to the benefits which flow to the listening public, this procedure aids the broadcaster by helping to head off practices which could (if left uncorrected) place his license in jeopardy. For this reason, we believe that most licensees welcome the opportunity to receive guidance on specific fairness matters on a timely basis.

48. Finally, a review only at renewal time would remove a major incentive for interested citizens to file fairness complaints—that is, the chance to have an opposing view aired over the station before the issue has become stale with the passage of time. At present, citizen complaints provide the principal means of insuring compliance with the fairness doctrine. If we were to remove the possibility that these complaints might result in broadcast time for a neglected point of view, we might well have to rely on government monitoring to carry out our investigative role. Such monitoring, of course, would represent an unfortunate step in the direction of deeper government involvement in the day-to-day operation of broadcast journalism.

49. There appears to be a misunderstanding on the part of some persons as to the manner in which the Commission administers the complaint process. On the one hand, some complainants have asserted that the Commission's procedures impose too great a burden on the complainant; on the other, some licensees and networks have claimed that our application of the doctrine may impose such a heavy burden on them as to discourage presentation of subjects which may be found to involve controversial issues of public importance.

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[17] Some have argued that "[t]he practical effect of this approach [review at time of renewal] to fairness is that the doctrine would have been abandoned." Barrow, *The Equal Opportunities and Fairness Doctrine in Broadcasting*, 37 Cin. L. Rev. 447, 493 (1968).

50. We believe a brief explanation and restatement of our procedures is in order. As we stated in our *Fairness Doctrine Primer*, 40 FCC 598 (1964):[18]

> Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints. *Id.* at 600.

51. The Commission requires that a complainant state the "basis for the claim that the station has presented only one side of the question" because the fairness doctrine does not require that each *program* present contrasting views on an issue; only that a licensee in its overall programming afford reasonable opportunity for presentation of contrasting views. Thus, when a complainant states that he heard or viewed a program which presented only one side of an issue, he has not, on the basis of this statement alone, made a fairness complaint upon which the Commission can act. Rather, we expect the complainant to state his reasons for concluding that in its other programming the station has not presented contrasting views on the issue.

52. This does not require, as some appear to believe, that the complainant constantly monitor the station. Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. While the complainant must state the basis for this claim that the station has not presented contrasting views, that claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved. This does not require that the complainant listen to or view the station 24 hours a day, seven days a week. One example of a "regular" television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. In the case of radio, a regular listener would include a person who, as a matter of routine, listens to major representative segments of the station's news and public affairs programming. Also, the assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience. We do not believe this requirement to be unduly burdensome, as contrasted to the heavy burden we would place on all stations if we required them to provide evidence of compliance with the fairness doctrine based on

[18] Because of the many developments which have taken place since 1964, we plan to issue a new fairness "Primer" in the near future.

complaints which assert merely that *one* program has presented only one side of an issue.

53. The fact that regular viewers or listeners have not been exposed to an opposing viewpoint is obviously not conclusive evidence that the viewpoint has not been presented, but it does indicate that there is a reasonable basis for the viewer's conclusion that such is the case. See *Alan C. Phelps*, 21 FCC 2d 12 (1969). Accordingly, we believe that it is a sufficient basis for a Commission inquiry to the station.

54. In responding to such an inquiry, a station is not required to research everything it has broadcast on the subject over a considerable period of time, unless it believes it is necessary to do so in order to establish its compliance with the fairness doctrine with respect to the issue involved. The complaint must specify the date and time of the *particular* program or programs which presented one side of the issue. If the complaint specifies only a single program, it would be sufficient for the licensee to furnish evidence of having broadcast another program which did afford a reasonable opportunity for contrasting views. Thus, the licensee is not expected to make a showing as to his overall programming, but merely that he has provided contrasting viewpoints an opportunity to be heard which is reasonable when considered in relation to the specific programs complained of.[19] In this regard, it should be kept in mind that the fairness doctrine does not require exact equality in the time provided for contrasting points of view, but only that a reasonable opportunity be afforded for their presentation.

55. After a complaint has been filed, some licensees have found it to be something of a burden to go back through their files and to question their news staff so as to construct a record of the programming they have carried on a given issue. For this reason, some licensees now keep a record of their public issue programming throughout the period of the license term. It should be a relatively simple matter for these stations to respond to a citizen complaint or to a Commission inquiry. Also, the keeping of such records should make it much easier for a licensee to *satisfy himself* that his station has achieved fairness on the various issues presented. While this Commission does not require the maintenance of a fairness log or diary, we expect that licensees will be cognizant of the programming which has been presented on their stations, for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet his fairness obligations.

56. The fifth requirement set forth in the above excerpt from our Public Notice—relating to "whether the station has afforded or has plans to afford, an opportunity for the presentation of contrasting viewpoints"—also may require explanation. We have found in many cases that if the complainant first addresses his complaint to the station, the licensee is able to provide an explanation satisfactory to the

[19] The procedure which we are outlining here is the one which we will follow in the ordinary case. It is possible, however, that in some circumstances the Commission may find it necessary to inquire into a station's total programming effort on an issue or at least a significant portion of that programming. Also, in cases where a message on one side of an issue has *obviously* been repeated many times (as in "editorial" advertising campaign), the complainant could not be expected to provide a list showing the time and date of each presentation. This information would have to be provided by the licensee in his response to a Commission inquiry.

complainant of what steps it has taken to broadcast contrasting views, or what steps it plans to take to achieve this end. It is for this reason that we ask complainants first to go to the station or network involved. If the station or network fails to answer the complaint at all, or to provide what complainant considers to be a satisfactory answer, then the complainant should address the complaint to the Commission, enclosing a copy of the complaint he sent to the station and a copy of its reply—or, if no response has been received after a reasonable period of time, so stating.

57. One further matter with respect to complaints and licensee responses thereto deserves some discussion. It would be a great assistance to the Commission, and would greatly expedite the handling of complaints, if all parties would be as specific as possible in defining the controversial public issue involved in the programs complained of. Also, it would save everyone concerned a great deal of time if, in listing those presentations on each side of an issue, parties would include only those programs which are truly germane to that specific issue."

E. Fairness and Accurate News Reporting

58. In our 1949 *Report on Editorializing*, we alluded to a licensee's obligation to present the news in an accurate manner:

> It must be recognised, however, that the licensee's opportunity to express his own views . . . does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. . . . A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy, 13 FCC at 1254–55.

It is a matter of critical importance to the public that the basic facts or elements of a controversy should not be deliberately suppressed or misstated by a licensee. But, we must recognize that such distortions are "so continually done in perfect good faith, by persons who are not considered . . . ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentations as morally culpable. . . ." J. S. Mill, *On Liberty* 31 (People's ed. 1921). Accordingly, we do not believe that it would be either useful or appropriate for us to investigate charges of news misrepresentations in the absence of substantial extrinsic evidence or documents that on their face reflect deliberate distortion. See *The Selling of the Pentagon*, 30 FCC 2d 150 (1971).

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[20] One station, in responding to a complaint concerning the issue of gasoline and air pollution, provided the Commission with a list of programs which included the following: "The Great Red Apes," "Turtle of the Sulu Sea," "The Night of the Squid," and "Return of the Sea Elephants." While such programming obviously would provide information on a part of the world's environment, it may not be germane to any specific issue concerning gasoline and air pollution.

III. APPLICATION OF THE FAIRNESS DOCTRINE TO THE BROADCAST OF PAID ANNOUNCEMENTS

59. We turn now to the fairness doctrine problems which stem from the broadcast of paid announcements. For the purpose of this discussion, we will consider three general categories of such announcements: (1) advertisements which may properly be classified as "editorial" in nature; (2) advertisements for commercial products or services: and (3) advertisements included in the Federal Trade Commission's so-called "counter-commercial" proposal.

The role of advertising in broadcasting and its relationship to the licensee's responsibility to broadcast in the public interest was considered by the Federal Radio Commission in 1929. 3 F.R.C. Ann. Rep. 32 (1929). It seems to us that the Commission at that time placed advertising in its proper context and perspective. It first noted that broadcasters are licensed to serve the public and not the private or selfish interests of individuals or groups. The Commission then stated that "[t]he only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible." *Id.* "The Commission . . . must recognize that, without advertising, broadcasting would not exist, and must confine itself to limiting this advertising in amount and in character so as to preserve the largest possible amount of service for the public." *Id.* at 35. Accordingly, we believe that any consideration of the applicability of the fairness doctrine to broadcast advertising must proceed with caution so as to ensure that the policies and standards which are formulated in this area will serve the genuine purposes of the doctrine without undermining the economic base of the system.

A. Editorial Advertising

60. Some "commercials" actually consist of direct and substantial commentary on important public issues. For the purpose of the fairness doctrine, these announcements should be recognized for what they are—editorials paid for by the sponsor. We can see no reason why the fairness doctrine should not apply to these "editorial advertisements" in the same manner that it applies to the commentary of a station announcer. At present, editorial advertising represents only a small percentage of total commercial time, and we cannot believe that an application of fairness here would have any serious effect on station revenues.

61. An example of an overt editorial advertisement would be a thirty- or sixty-second announcement prepared and sponsored by an organization opposed to abortion which urges a constitutional amendment to override a decision of the Supreme Court legalizing abortion under certain circumstances. While the brevity of such announcements might make it difficult to develop the issue in great detail, they could, nevertheless, make a meaningful contribution to the public debate, and we believe that the fairness doctrine should be fully applicable to them.

62. Editorial advertisements may be difficult to identify if they are sponsored by groups which are not normally considered to be engaged in debate on controversial issues. This problem is most likely to arise

in the context of promotional or institutional advertising; that is, advertising designed to present a favorable public image of a particular corporation or industry rather than to sell a product. Such advertising is, of course, a legitimate commercial practice and ordinarily does not involve debate on public issues. See, e.g., *Anthony R. Martin-Trigona*, 19 FCC 2d 620 (1969). In some cases, however, the advertiser may seek to play an obvious and meaningful role in public debate. In such instances, the fairness doctrine—including the obligation to provide free time in the circumstances described in the *Cullman* decision—applies.

63. In the past, we have wrestled with the application of the fairness doctrine to institutional advertisements which appeared to have discussed public issues, but which did not *explicity* address the ultimate matter in controversy. An example of this problem may be found in the so-called "*ESSO*" case. *National Broadcasting Co.*, 30 FCC 2d 643 (1971). Here, the Commission found that certain commercials for Standard Oil Company constituted a discussion of one side of a controversial issue involving construction of the Alaskan pipeline. These advertisements did not explicitly mention that pipeline, but they did present what could be termed arguments in support of its construction. Specifically, we found that the advertisements argued that the Nation's urgent need for oil necessitated a rapid development of reserves on Alaska's North Slope. *Id.* at 643. The commercials also referred to the ability of an ESSO affiliate to build a pipeline in the far north, and yet "preserve the ecology." *Ibid.* As we noted on rehearing, the problem involved here "is indeed a difficult one . . . because the pipeline controversy is not specifically referred to. . . ." *Wilderness Society*, 31 FCC 2d 729, 733, *reconsideration denied* 32 FCC 2d 714 (1971).

64. In the face of such difficulties, what guidance can the Commission give to its licensees and to the public? Professor Louis Jaffe has offered the following suggestion:

> [I]t is not easy to formulate a fully satisfactory rule for applying the fairness doctrine to advertising. Its application is most obvious where the advertisement is explicitly controversial. But the advertiser may avoid the explicit precisely to foreclose a claim of rebuttal, or because he believes the subliminal is more effective. It should suffice to trigger the doctrine that by implication he intends to speak to a current, publicly-acknowledged controversy. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 *Harv. L. Rev.* 768, 777–78 (1972).

We believe that this suggestion comes close to the mark, but what we are really concerned with is an obvious participation in public debate and not a subjective judgment as to the advertiser's actual intentions. Accordingly, we expect our licensees to do nothing more than to make a reasonable, common sense judgment as to whether the "advertisement" presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance. This determination cannot be made in a vacuum; in addition to his review of the text of the ad, the licensee must take into account his general knowledge of the issues and arguments in the ongoing public debate. Indeed, this relationship of the ad to the debate being carried on in the community is critical. If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference, the fairness doctrine would clearly not be applicable.

65. The situation would be different, however, if that relationship could be shown to be both substantial and obvious. For example, if the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved had been presented thereby raising fairness doctrine obligations. See, e.g., *Media Access Project* (Georgia Power), 44 FCC 2d 755, 761 (1973). We fully appreciate that, in many cases, this judgment may prove to be a difficult one and individual licensees may well reach differing conclusions concerning the same advertisement. We will, of course, review these judgments only to determine their reasonableness and good faith under the particular facts and circumstances presented and will not rule against the licensee unless the facts are so clear that the only reasonable conclusion would be to view the "advertisement" as a presentation on one side of a specific public issue.

B. Advertisements for Commercial Products or Services

66. Many advertisements which do not look or sound like editorials are, nevertheless, the subject of fairness complaints because the business, product, or service advertised is itself controversial. This may be true even though the advertisement does not mention any aspect of a controversy. Commercial announcements of precisely this type led to the current debate over fairness and advertising. This debate began in 1967 with our decision to extend the fairness doctrine to advertisements for cigarettes. *WCBS-TV*, 8 FCC 2d 381, *stay and reconsideration denied* 9 FCC 2d 921 (1967). These advertisements, like many others, addressed themselves solely to the desirability of the product. They tended to portray "the use of the particular cigarette as attractive and enjoyable. . . ." but avoided any mention of the then raging smoking-health controversy. 8 FCC 2d at 382. At the time, broadcasters argued that, in the absence of an affirmative discussion of the health issue, the commercials could not realistically be viewed as part of a public debate. 9 FCC 2d at 938. We rejected this argument and insisted that the issue should be defined in terms of the desirability of smoking. *Id.* With the issue defined in this fashion, it was a simple mechanical procedure to "trigger" the fairness doctrine and treat all cigarette advertisements—regardless of what they actually said—as being presentations on one side of a controversial issue. It seemed to be clear enough that *all* cigarette advertisements suggested that the use of the product was desirable.

67. In retrospect, we believe that this mechanical approach to the fairness doctrine represented a serious departure from the doctrine's central purpose which, of course, is to facilitate "the development of an *informed* public opinion." *Report on Editorializing*, 13 FCC 1246, 1249 (1949) (emphasis supplied). We believe that standard product commercials, such as the old cigarette ads, make no meaningful contribution toward informing the public on any side of any issue. Indeed, as the D.C. Circuit Court of Appeals succinctly stated:

> Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. . . . Accordingly, even if . . .

[such] commercials are protected speech, we think they are at best a negligible part of any exposition of ideas, and are of . . . slight social value as a step to truth. . . . *Banzhaf* v. *FCC*, 405 F. 2d 1082, 1101–02 (D.C. Cir. 1968), quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942).

In this light, it seems to us to make little practical sense to view advertisements such as these as presenting a meaningful discussion of a controversial issue of public importance.

68. In our view, an application of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy. In the cigarette case, for example, the ads run by the industry did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health. At the time of our ruling, Commissioner Loevinger suggested that we were not really encouraging a balanced debate but, rather, were simply imposing our view that discouraging smoking was in the public interest. 9 FCC 2d at 953.[21] While such an approach may have represented good policy from the standpoint of the public health, the precedent is not at all in keeping with the basic purposes of the fairness doctrine.[22]

69. This precedent would not have been particularly troublesome if it had been limited to cigarette advertising as the Commission originally intended.[23] In 1971, however, the D.C. Circuit ruled that the cigarette precedent could not logically be limited to cigarette advertising alone. *Friends of the Earth* v. *FCC*, 449 F. 2d 1164 (D.C. Cir. 1971). In this decision, it was suggested that high-powered cars pollute the atmosphere more than low-powered cars.[24] It was then determined that the fairness doctrine was triggered by the advertisements there involved because they extolled the virtues of high-powered cars

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[21] Following the Congressional ban on cigarette advertising, the Commission was criticized even more strongly for taking sides on this issue. At that time, we ruled that stations were free to broadcast anti-smoking messages without incurring any obligation to carry arguments in favor of smoking. This holding was based on a Commission determination that the issue was no longer controversial. *Cigarette Advertising and Anti-Smoking Presentation*, 27 FCC 2d 453 (1970), *aff'd sub nom. Larus & Brother Co.* v. *FCC*, 477 F. 2d 876 (4th Cir. 1971).

[22] In the conclusion to our second opinion in the cigarette case, we tried to make it clear that our holding was based more on public health considerations than on "the specifics of the Fairness Doctrine." *WCBS–TV*, 9 FCC 2d 921, 949 (1967). We recognized that, in view of the overwhelming evidence of danger to the public health, the question presented would ordinarily be "how the carriage of such commercials is consistent with the obligation to operate in the public interest." *Id.* We felt, however, that the question of removing these commercials from the air was one Congress had reserved to itself, and that the only remedy we were free to implement was one along the lines suggested by the fairness doctrine. The fairness doctrine, therefore, served "chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed." *Banzhaf* v. *FCC*, 405 F. 2d at 1093. Subsequent to our action in the cigarette case, the Congress developed a more complete remedy of its own by banning the broadcast of cigarette ads entirely in the Public Health Cigarette Smoking Act of 1969. See generally *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem. sub nom. Capital Broadcasting Co.* v. *Kleindienst*, 405 U.S. 1000 (1972). If in the future we are confronted with a case similar to that presented by the cigarette controversy, it may be more appropriate to refer the matter to Congress for resolution. For Congress is in a far better position than this Commission to develop expert information on whether particular broadcast advertising is dangerous to health or otherwise detrimental to the public interest. Furthermore, it is questionable whether this Commission has a mandate so broad as to permit it "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.'" *Banzhaf* v. *FCC*, 405 F. 2d at 1090.

[23] At the time, cigarettes were thought to be a unique product because their "normal use has been found by congressional and other Governmental action to pose . . . a serious threat to general public health . . . ." 9 FCC 2d at 943. In a concurring opinion, Commissioner Johnson expressed the view that "[b]y drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began." *Id.* at 958. In affirming our ruling, the D.C. Circuit agreed that cigarettes were, in fact, "unique." *Banzhaf* v. *FCC*, 405 F.2d 1082, 1097 n. 63 (D.C. Cir. 1968).

[24] The case also considered a comparison of high-test and "regular" gasoline.

and thus glorified product attributes aggravating an existing health hazard, namely air pollution. The commercials, of course, made no attempt at all to discuss the product in the context of the air pollution controversy. If these advertisements presented one point of view on the issue, then, by the same reasoning, the "contrasting" viewpoint must have been similarly presented in ads for low-powered cars. The problem with this kind of logic is that it engages both broadcasters and the Commission in the trivial task of "balancing" two sets of commercials which contribute nothing to public understanding of the underlying issue of how to deal with the problem of air pollution.[25]

70. We do not believe that the underlying purposes of the fairness doctrine would be well served by permitting the cigarette case to stand as a fairness doctrine precedent. In the absence of some meaningful or substantive discussion, such as that found in the "editorial advertisements" referred to above, we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. It would be a great mistake to consider standard advertisements, such as those involved in the *Banzhaf* and *Friends of the Earth*, as though they made a meaningful contribution to public debate. It is a mistake, furthermore, which tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion. Accordingly, in the future, we will apply the fairness doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues.

C. The Federal Trade Commission Proposal

71. The Federal Trade Commission has filed a statement in this inquiry which proposes the creation of a right of access to respond to four categories of commercial announcements. Very generally, these categories are as follows: (a) those advertisements that explicitly raise controversial issues; (b) those that raise such issues implicitly; (c) those that make claims based on scientific premises that are in dispute; and (d) those that are silent about negative aspects of the advertised products.

72. We have already discussed the first two categories and the applicability of the fairness doctrine with respect thereto. One of our major difficulties with the FTC's categories is that they seem to include virtually all existing advertising. As one commentator has stated, "it is hard to imagine a product commercial so pure that it would not be viewed as implicitly raising some controversial issue or resting upon some disputed scientific premise or remaining silent about negative aspects of the product." Putz, *Fairness and Commercial Advertising: A Review and a Proposal*, 6 *U.S.F.L. Rev.* 215, 246 (1972). We believe that the adoption of the FTC proposal—wholly

[25] The Court has further suggested that the cigarette precedent might logically have to be extended out of the health area entirely to cover some labor-management disputes. *Retail Store Employees Union* v. *FCC*, 436 F.2d 248 (D.C. Cir. 1970). The Court, however questioned whether such an application would truly serve the underlying purposes of the fairness doctrine: "Stripped to its essentials, this dispute is one facet of the economic warfare that is a recognized part of labor management relations. . . . Part of the Union's campaign was publicity for its boycott; part of management's arsenal was advertising to persuade the public to patronize its stores. If viewed in this light, *it could well be argued that the traditional purposes of the fairness doctrine are not substantially served* by presentation of advertisements intended to less inform than to serve merely as a weapon in a labor-management dispute." *Id.* at 259. (Emphasis supplied.)

apart from a predictable adverse economic effect on broadcasting—might seriously divert the attention and resources of broadcasters from the traditional purposes of the fairness doctrine. We are therefore not persuaded that the adoption of these proposals would further "the larger and more effective use of radio in the public interest . . ." 47 U.S.C. Section 303(g), or contribute in any way to the promotion of genuine debate on public issues.

73. We do not believe that our policy will leave the public uninformed on important matters of interest to consumers. Certainly, we expect that consumer issues will rank high on the agenda of many, if not most, broadcasters since their importance to the public is self-evident. But our point is that the decision to cover these and other matters of similar public concern appropriately lies with individual licensees in the fulfillment of their public trustee responsibilities, and should not grow out of a tortured or distorted application of fairness doctrine principles to announcements in which public issues are not discussed.

74. A matter which relates directly to the FTC proposal was considered in the so-called "Chevron" case. *Alan F. Neckritz*, 29 FCC 2d 807 (1971), *reconsideration denied* 37 FCC 2d 528 (1972). This case involved a claim made by Chevron that its F–310 additive would reduce exhaust emissions and contribute to cleaner air. Chevron did not claim that its product would solve the air pollution problem caused by automobiles, but did extol the product's virtues in reducing pollution. Complainants argued that the claim was controversial within the meaning of the fairness doctrine. They supported this argument by pointing to a pending FTC complaint which alleged that the claims made on behalf of F–310 were false and misleading. 29 FCC 2d at 816. While the F–310 claim obviously did relate to a matter of public concern, we do not believe that the ads engaged in an obvious and meaningful discussion of a controversial issue of public importance. As we stated in "Chevron,"

> "making a claim for a product is not the same thing as arguing a position on a controversial issue of public importance. That the claim is alleged to be untrue or partially deceptive does not change its nature. . . . It would ill suit the purposes of the fairness doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility. The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy—to name but a few examples that come readily to mind—do not rise to the level of a significant public issue. . . . We think this conclusion is required not only as a matter of reason, but also of practical necessity if fairness is to work for the public and not to its detriment." *Alan F. Neckritz*, 29 FCC 2d at 812.

75. We do not believe that the fairness doctrine provides an appropriate vehicle for the correction of false and misleading advertising. The fairness doctrine is only one aspect of the public interest. A Congressionally-mandated remedy for deceptive advertising already exists

in the form of various FTC sanctions.[26] If an advertisement is found to be false or misleading, we believe that the proper course is to ban it altogether rather than to make its claims a subject of broadcast debate. We believe that the approach to advertising outlined here will do much to reduce the confusion which has existed in this area. Under the general fairness doctrine, broadcasters—as trustees for their communities—are required to make a positive effort to implement a meaningful discussion of major public issues and in practical effect consumer issues will receive a significant amount of coverage. But at the same time, we do not believe that it is in the public interest to stretch the fairness doctrine in an artificial way by applying it to commercials which play no meaningful or significant role in the debate of controversial issues.

76. In the separate but related area of deceptive advertising, we believe that the public interest can be best served through the existing, Congressionally-mandated scheme of regulation, and by a conscientious effort on the part of broadcasters to meet their obligations in this area.[27]

IV. ACCESS GENERALLY TO THE BROADCAST MEDIA FOR THE DISCUSSION OF PUBLIC ISSUES

77. Various parties to this proceeding have argued that, quite aside from the traditional fairness doctrine, there should be a system of mandated access, either free or paid, for persons or groups wishing to express a viewpoint on a controversial public issue. In the *"BEM"* case,[28] the Supreme Court made it clear that such access is not a matter of either constitutional or statutory right. The Court noted, however, that Congress has left the Commission with "the flexibility to experiment with new ideas as changing conditions require." *Id.* at 122. It was further stated that "at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." *Id.* at 131.

78. Our studies during the course of this inquiry have not disclosed any scheme of government-dictated access which we consider "both practicable and desirable." We believe, to the contrary, that the public's interest in free expression through broadcasting will best be served and promoted through continued reliance on the fairness doctrine which leaves questions of access and the specific handling of public issues to the licensee's journalistic discretion. This system is far from perfect. However, in our judgment, it does represent the most appropriate accommodation of the various First Amendment interests involved, and provides for maximum public enlightenment on issues of significance with a minimum of governmental intrusion into the journalistic process.

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[26] The problem may be further alleviated by the FTC's newly developed ad substantiation program. See 36 Fed. Reg. 12,058 (1971); and generally, Note, *The FTC Ad Substantiation Program*, 61 Geo. L.J. 1427 (1973).

[27] See *Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising*, 32 FCC 2d 396 (1971); *Consumer Association of District of Columbia*, 32 FCC 2d 400 (1971).

[28] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973).

79. In our opinion, this Commission would not be justified in dictating the establishment of a system of access to particular spokesmen on either a free or paid basis. If the access were *free*, the government would inevitably be drawn into the role of deciding who should be allowed on the air and when.[29] This governmental involvement in the day-to-day processes of broadcast journalism would, we believe, be antithetical to this country's tradition of uninhibited dissemination of ideas. With regard to the suggestion that we establish a system of *paid* access, we believe that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth," *BEM*, 412 U.S. at 123, or wherein "money alone determines what issues are to be aired, and in what format," *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971) (McGowan, J., dissenting). This problem would in no way be alleviated by the application of the fairness doctrine, including the *Cullman* corollary, to editorial advertising, since the agenda for public debate would be set solely by those financially able to take advantage of the right to purchase time in the first instance. Furthermore, there would be elements of unfairness in applying the *Cullman* principle in this situation, for it would require the licensee to correct an imbalance—at its own expense—which it had not created. On the other hand, if *Cullman* were suspended in the case of editorial advertisements, the public would be left in many if not most instances with one-sided presentations of those issues which the financially able chose to discuss.

80. We have given serious thought to the suggestion that broadcasters be required to maintain a policy of examining and considering—but not necessarily accepting—editorial advertisements tendered for broadcast. While this suggestion has some surface appeal, we believe that such a requirement would, in our judgment, inevitably draw this Commission into deciding a broadcaster's good faith in accepting or rejecting proffered material and into adjudicating competing claims to buy limited time on the basis of criteria that would necessarily favor one person's speech over another's. This is precisely the sort of governmental intrusion which we have sought to avoid in developing and administering the fairness doctrine, and why we believe that our present policy of leaving such decisions initially to the editorial discretion of the licensee, though imperfect, must be maintained. As Chief Justice Burger stated for the Court in *BEM*:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. 412 U.S. at 124–25.

81. While we have rejected the suggestion that the Commission should establish a system of mandated access (either free or paid), we

[29] The only alternative to governmental involvement of this type would appear to be access on a first-come-first-served basis (or by lot or drawing). This system would, however, give no assurance that the most important issues would be discussed on a timely basis. Moreover, as the Supreme Court observed in *BEM*, "[t]he public interest would no longer be 'paramount' but rather subordinate to private whim especially since . . . a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster." 412 U.S. at 124.

certainly do not mean to suggest any disapproval of efforts by broadcasters to provide for access to their stations. Indeed, the fairness doctrine itself insures that many citizens will be afforded a type of access, for the licensee

> is required to "present representative community views and voices on controversial issues which are of importance to [its] listeners," and it is prohibited from "excluding partisan voices and always itself presenting views in a bland, inoffensive manner." 25 FCC 2d at 222. A broadcaster neglects that obligation only at the risk of losing his license. *BEM*, *supra* at 131.

Under this system, many representative community spokesmen do express their views in newscasts, interviews, call-in programs, editorial replies, and through various other formats. Thus, while no particular individual has a guaranteed *right* of access to the broadcast microphone for his own self-expression, the public as a whole does retain its "paramount" right "to *receive* suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 390 (emphasis supplied). In a real sense, therefore, there is a "right of access" in broadcasting, that right being guaranteed the listening and viewing public. However, in order to secure this right to the people, and to avoid unwarranted governmental supervision, Congress has delegated the primary responsibility for the selection of particular spokesmen and specific program material to private licensees who are required to serve as *trustees for the public*. As the Supreme Court stated in its *BEM* decision:

> This policy [of concentrating the allocation of journalistic priorities in the licensee] gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators. 412 U.S. at 125.

82. We do not mean to suggest that broadcasters are in any way required to maintain "tight editorial control" over the spokesmen who appear on their stations. Much to the contrary, we wish to give every encouragement to broadcasters to experiment with new ways of providing for wide-open debate of public issues. Our point here is that while genuine partisan debate should be encouraged, we cannot, at this time, justify or support its particularized imposition by Commission fiat.

83. Although we have here reaffirmed the present system of licensee responsibility and discretion and rejected requests for the creation of a direct "right" of access, we wish to emphasize that this system is predicated entirely upon the assumption that licensees will in fact make a reasonable, good faith effort to meet their public obligations. Licensee discretion is but a means to a greater end, and not an end in and of itself, and only insofar as it is exercised in genuine conformity with the paramount right of the listening and viewing public to be informed of the competing viewpoints on public issues can such discretion be considered an adequate means of maintaining and enhancing First Amendment interests in the broadcast medium. For the present, we remain convinced that the general rubric of the fairness doctrine, with

its emphasis on licensee responsibility and discretion, provides the most desirable and practical means to that end. However, should future experience indicate that the doctrine is inadequate, either in its expectations or in its results, the Commission will have the opportunity—and the responsibility—for such further reassessment and action as would be mandated by the public interest and the First Amendment.

V. APPLICATION OF THE FAIRNESS DOCTRINE TO POLITICAL BROADCASTS—BALLOT PROPOSITIONS

84. The First Report on Part V of the Fairness Doctrine Inquiry, 36 FCC 2d 40 (1972), dealt almost exclusively with appearances by the President and other public officials and with questions of the application of the *Zapple* doctrine [30] to such appearances. However, Part V of our Notice of Inquiry phrased the *Zapple* question in broader terms:

> We request comment on such relevant questions as the following: whether the quasi-equal opportunities approach should be restricted, expanded, or left alone, with a specific description of the feasibility and effect of any proposed revision on the underlying policies of the statute (see Section 315(a)). 30 FCC 2d 26, 34 (1971).

We now address ourselves specifically to application of the fairness doctrine to ballot propositions such as referenda, initiative or recall propositions, bond proposals and constitutional amendments.

85. Some comments filed in this inqury have urged that *Zapple* rather than the *Cullman* doctrine be applied to ballot propositions on the ground that such situations are analogous to those covered by the "equal opportunities" requirement of Section 315 and the "political supporters" policy in *Zapple*. One party has suggested that not only should *Cullman* apply but that when one side buys spots, the licensee should be required to present opposing announcements in the same format (i.e., spots), and also to afford proponents of all sides opportunity for extended discussion of the issues. In this regard, the Commission also has received informal complaints that application of the *Cullman* doctrine to ballot propositions is unfair on the ground that it enables proponents of one side to spend their money on newspaper, billboard and direct mail advertising—where there is no *Cullman* requirement—and then to rely on *Cullman* to obtain free broadcast exposure of their views because the other side has spent its money in that medium.

86. After considering all comments, we find no substantial reason to alter our previous application of the fairness doctrine to ballot propositions. The *Zapple* doctrine, which some urge that we apply to this area, was adopted solely because it was analogous to the situation for which Congress itself had provided for "equal opportunities." As we explained in our First Report, *Zapple* was simply a common-sense application of the statutory scheme relating to appearances by political candidates, and we made clear the fact that we did not intend to extend its application further. While ballot propositions are similar to political candidacies in the sense that both are subject to popular vote, they are more closely analogous to ordinary public issues such as a bill

[30] See *Nicholas Zapple*, 23 FCC 2d 707 (1970).

pending in Congress or a state legislature. We are unable to perceive why such issues should be treated differently merely because they are subject to popular vote. In a case involving political candidacies, the natural opposing spokesmen are readily identifiable (i.e., the candidates themselves or their chosen representatives). In the case of a ballot proposition, however, there is generally no specific individual or group which is entitled to equal or comparable time. Furthermore, Congress has shown no intent to alter the Commission's traditional application of the fairness doctrine, including the *Cullman* corollary, to ballot propositions.

87. It has been argued that in the closing days of an election campaign, licensees may be overwhelmed by orders for large quantities of spot announcements favoring or opposing a proposition, and could be hard put to comply with the requirements of the fairness doctrine if only one side buys time. No licensee, however, is required to sell all the time that an advocate of a proposition (or even a legally qualified candidate) may wish to buy.[11] Indeed, some licensees in the past have discovered to their dismay that an employee has sold an inordinate amount of time in the closing days of a campaign to one candidate—only to be confronted by a demand from the opposing candidate to buy an equal amount. It is the responsibility of the licensee in such situations to look ahead and commit himself to no more time for Candidate A than he is prepared to sell to Candidate B. Similarly, no licensee is required by statute or Commission rule or policy to yield his facilities to one side of a ballot proposition for a so-called "blitz." His clear obligation in fairness situations is, again, to plan his programming in advance so that he is prepared to afford reasonable opportunity for presentation of contrasting views on the issue, whether or not presented in paid time.[12]

88. Finally, it is argued that some ballot issue advocates take advantage of the *Cullman* principle by spending their available money on non-broadcast media, then waiting for the other side to buy time on the air, and finally demanding that their own views on the proposition be given free broadcast exposure, thus obtaining a broadcast "subsidy" for their views. To the extent that this could occur, the same criticism can be voiced against any application of *Cullman*. We

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[11] However, stations are required to either give or sell reasonable amounts of time to candidates for federal elective office. 47 U.S.C. Section 312(a)(7); See also *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 24 FCC 2d 510 (1970). While we do not dictate how much time should be devoted to the various issues being debated in a community, ballot propositions and other election matters will frequently receive considerable coverage on the basis of their importance to the community. In this regard, we recognize that "The existence of an issue on which the community is asked to vote must be presumed to be a controversial issue of public importance, absent unusual circumstances . . . . It is precisely within the context of an election that the fairness doctrine can be best utilized to inform the public of the existence of and basis for contrasting viewpoints on an issue about which there must be a public resolution through the election process." *King Broadcasting Co.*, 23 FCC 2d 41, 43 (1970) (staff ruling).

[12] In our Public Notice of March 16, 1972, 34 FCC 2d 510, setting forth our interpretation of the Federal Election Campaign Act of 1971, we stated that Congress, in amending Section 312(a) of the Communications Act to require licensees to allow reasonable access to or to permit purchase of reasonable amounts of time by candidates for federal elective office, "clearly did not intend, to take the extreme case, that during the closing days of a campaign stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts. . . ." (Question and Answer 2, Section VIII). The same principle would, of course, apply to ballot propositions.

APPENDIX C

F.C.C. 76-265

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST STANDARDS OF THE COMMUNICATIONS ACT.	Docket No. 19260

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FAIRNESS REPORT

(Adopted: March 19, 1976; Released: March 24, 1976)

BY THE COMMISSION: CHAIRMAN WILEY ISSUING A SEPARATE STATEMENT; COMMISSIONER HOOKS CONCURRING AND ISSUING A STATEMENT; COMMISSIONER ROBINSON DISSENTING AND ISSUING A STATEMENT.

I. *Introduction*

1. During the past four years, the Commission has engaged in a comprehensive inquiry into the purposes and the application of the fairness doctrine. The extent of public input in this proceeding is documented in the *Fairness Report*, 48 FCC 2d 1 (1974). We now have before us various petitions for reconsideration of that *Report*. We here turn our attention to the questions raised by those petitions, and other questions which have come to our attention requiring further clarification of our fairness doctrine policy.

2. The petitions for reconsideration present a vigorous disagreement with the *Report's* position on applying the doctrine to standard product commercial advertising, and present a proposed alternative to the doctrine. They further suggest that the doctrine be invoked only in license renewal proceedings, and suggest applications of the doctrine for slanted or staged news, personal attacks, and editorial advertising.

3. Petitioner Henry Geller argues that the Commission is prohibited from applying the doctrine except as part of a license renewal proceeding. Mr. Geller's conclusion is based on his reading of two recent Supreme Court decisions[1] and on the early history of the Fairness Doctrine. He proposes that licensees adopt a "ten issue" approach to meeting fairness obligations and that all complaints be referred to the licensee when they are received. He further advocates a "hands-off" policy for the Commission concerning news distortion or slanting.[2]

4. Mr. Geller further urges the Commission to modify its "crazy quilt" personal attack rules. He suggests instead that if such an attack

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[1] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *CBS* v. *DNC*, 412 U.S. 94 (1973).

[2] Under his proposal, Commission action would be taken only upon extrinsic evidence showing that the owner or "top management" gave instructions for deliberate slanting. Deliberate slanting by other station personnel would be a matter to be resolved by the licensee without any Commission follow-up.

is made as part of the discussion of a controversial issue of public importance and the licensee has not achieved fairness nor made timely plans to do so, then the licensee must notify the attacked party within a "reasonable time" and offer an opportunity for response. Geller urges us to require broadcasters to examine and consider editorial advertising without requiring them to accept any. Finally, he opposes the decision not to apply the doctrine to product efficacy advertising. In this last position, he is joined by the Media Access Project (MAP) petitions.[3] MAP contends that the Commission has failed to articulate its reasons for allegedly exempting product advertising from the doctrine and that hearings should have been held to determine that decision's economic impact. Moreover, MAP argues that prior Court decisions require that the Commission include product advertising within the ambit of the fairness doctrine, and that it is improper to conclude that advertisements for particular product line or brand cannot advocate a controversial issue of public importance.

5. MAP's position is opposed by Metromedia and McKenna, Wilkinson and Kittner (on behalf of broadcast clients). Metromedia cites the depth of the Commission's inquiry in this docket and argues that MAP's interpretation of certain Court decisions is over broad. The McKenna response faults MAP for merely offering its own counter-assumptions supplemented with a few random and inconclusive statistics. It suggests that, under MAP's proposal, the Commission would have to make subjective evaluations of the informational impact of commercial messages.

6. MAP proposes that before a complaint may be filed with the Commission, the station must answer the complaint stating whether the issue is a controversial issue of public importance and what contrasting programming has been aired. Metromedia and McKenna argue that the proposal would be a significant departure from present standards by imposing the initial burden, that properly should remain with the complainant, on the individual station.

7. The final petition, by the Committee for Open Media (COM), proposes an optional plan which, if adopted by the licensee, would satisfy his general fairness obligations. COM proposes a scheme of access through "Free Speech Messages" (FSM), publicly available spot announcements aired at different times during the week. One half of the spots would be allocated on a first-come, first-served basis, and the remainder would be rotated among "representative spokespersons" from groups which have demonstrated significant community support. COM would not apply this system to partisan political access and recommends amending the personal attack rules to exempt such attacks made in an FSM.

II. *Discussion*

A. Purpose of the Fairness Doctrine

8. The purpose of the fairness doctrine was discussed in some depth in the Fairness Report, *supra* at 2–8, but events subsequent to the

[3] For the United Farm Workers (UFW), the Council on Economic Priorities (CEP), and the Project on Corporate Responsibility (PCR).

adoption of the Report indicate that a recapitulation of our views is called for here.

9. There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that "[i]t is the right of the viewers and listeners, not the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). The fundamental concept which underscores this right is that the continued vitality of a democratic society and its freedoms requires the "widest possible dissemination of information from diverse and antagonistic sources. . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). We must always keep in mind that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964).[4] The relationship of this principle to broadcasting was articulated in *Green* v. *FCC*, 447 F.2d 323 (1973). There it was held that "the essential basis of any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed." *Id.* at 329.

10. It is difficult to believe that the Court in *Green*, *supra*, intended the American public to be only half-informed, particularly in light of the language in *Associated Press*, *supra*, calling for the "widest possible dissemination of information from diverse and antagonistic sources. . . ." *Id.* at 20 (emphasis added). Full information is the theoretical underpinning of the broadcaster's two duties; to cover controversial issues of public importance fairly by providing an opportunity for the presentation of contrasting points of view; and to devote a reasonable amount of broadcast time to the coverage of public issues.

11. We do not subscribe to the theory that recent Supreme Court decisions have established boundaries concerning the fairness doctrine. In *Miami Herald* v. *Tornillo*, *supra*, the Court's opinion was limited only to print media and cited language in *CBS* v. *DNC*, *supra*, which set apart broadcasting and newspapers. 418 U.S. 241, 255 (1974), quoting from 412 U.S. 94, 117 (1973). The language relied upon by Mr. Geller in his petition clearly places the Court's emphasis on "newspapers" in the context of the historical evolution of free "press" guarantees.

12. It is suggested that the Court's language in *CBS*, *supra*, that "[f]or better or worse, editing is what editors are for . . . ," is a pronouncement that the Commission must abandon its current views on the fairness doctrine. Yet the lines preceding that quotation reveal that language as presenting a choice between the view "that every potential speaker is 'the best judge' of what the listening public ought

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[4] This conceptual approach to the right of free speech is supported by related holdings in cases dealing with fundamental rights and the continued vitality of the democratic process. The Supreme Court has stated that "no right is more precious in a free country than that of having a voice in the election of those who make the laws. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964), cited with approval in *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968). In *Williams*, the Courts went on to say that the individual's right to vote is "heavily burdened" where the number of parties allowed on the ballot is restricted without a showing of a compelling state interest for such a restriction, *Id.* This view was applied to candidates as well as parties in *Lubin* v. *Panish*, 415 U.S. 709 (1974). The essential thread of reasoning in these cases, like *Red Lion*, is that it is the citizen who has the right to listen to and to vote for a diverse selection of views and candidates, rather than the rights of candidates to a ballot position, or of broadcasters to be heard, that is paramount.

to hear" and the view that such choices are better left to editors. 412 U.S. at 124. The Supreme Court did not address in *CBS* the question of licensee discretion *vis-a-vis* the Commission's role as the ultimate arbiter of the fairness doctrine. The Court did not generalize that overzealous invocation of the fairness doctrine might cause an "erosion of the journalistic discretion of broadcasters in the coverage of public issues." 412 U.S. at 124. The Court was instead specifically concerned with the question of licensee discretion *vis-a-vis* individuals demanding a right of access. The Court said that if the Fairness Doctrine were expanded to include mandatory access there would be a

> . . . substantial danger that the effective operation of that doctrine would be jeopardized. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. *Id.*

13. The *CBS* decision's denial of the right of access was predicated on the continued existence and enforcement of the fairness doctrine as it has developed over the years. In the language quoted above, the Court implied that it preferred control over the treatment of public issues to remain with licensees because they are "accountable for broadcast performance." *Id.* The Court further stated that it feared that a transfer of such control would jeopardize the effective operation of the fairness doctrine. In *CBS*, therefore, the Supreme Court reaffirmed its continued belief in and support for the fairness doctrine and *Red Lion*.

B. The Statutory Scheme—Balancing Rights and Burdens

14. The legislative framework regulating broadcasters is grounded in the "public interest" and the courts have consistently recognized that "[t]his mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive.'" *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943), cited with approval 395 U.S. at 380. The Supreme Court has made it clear that "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." 395 U.S. at 392. The Court also recognized that while the "initial and primary responsibility for fairness, balance and objectivity" rests upon the licensee, the Commission is the "overseer and ultimate arbiter and guardian of the public interest." *CBS* v. *DNC*, 412 U.S. 94, 117 (1973).

15. The statutory scheme calls for balancing the people's First Amendment rights and the rights of the media. Over the past half century, "Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned." *CBS* v. *DNC*, 412 U.S. 94, 102. This system is outlined with specific procedural requirements and with substantive guidelines upon which both viewer and licensee may rely. The Commission has tailored its actions so as not to become, in effect, the broadcast journalist or programmer. We do not believe that it would be in the public interest to upset this delicate balance.

16. In the *Fairness Report*, *supra* at 17-18, we rejected the notion that all fairness complaints should be reviewed only as part of license

renewal proceedings. There, we said that we believed it would be impossible to evaluate overall licensee performance at renewal time without considering the specifics of individual complaints. The public's right to be informed is best safeguarded by an ongoing review of all fairness complaints. For example, the incentive for citizens to file complaints would be removed if their complaints would not result in the opposing viewpoint being aired before the issue has become stale with the passage of time. Continuing enforcement helps the broadcaster by helping to remedy violations which would place his license in jeopardy before a flagrant pattern of abuse develops. *Id.* at 18. We do not believe that a departure from that position would be in the public interest. We conclude, therefore, that in view of the considerations enunciated above, it would be most appropriate to utilize this case by case approach to ensure that broadcasters fulfill their affirmative responsibilities under the fairness doctrine to adequately cover controversial issues of public importance and to present differing viewpoints on those issues. See *Public Communications Inc.*, 50 FCC 2d 395 (1974).

17. As part of the ongoing review procedure of fairness complaints, the Commission will continue to make its determinations of licensee reasonableness in the context of overall programming on an issue rather than on a particular program.[5] We recognize that there are difficulties inherent in selecting a finite period of time (i.e., a "cut-off" date) in which to view the "overall" programming on an issue. We see no advantage to the arbitrary selection of the license term as the period over some other time period.[6] Indeed, since the fairness doctrine is oriented toward issues and varying viewpoints, it is preferable to retain the present flexibility in reviewing a time period during which the issue is a matter of public controversy and public importance.

18. We are urged to reconsider our procedure for handling fairness complaints. The Commission's complaint procedures and substantive rulings attempt to strike and maintain a delicate balance between licensees and complainants to ensure that neither side is unduly disadvantaged. We noted in the *Fairness Report*, *supra*, at 18, that there seems to be a lack of understanding of Commission complaint procedures. In an effort to alleviate that problem, the procedures were

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[5] The only instance in which the Commission's determination might rest on a single program would involve a complaint where the licensee declares it has not presented prior programming on that issue and announces its intention not to present any future programming on that issue. Hence, that single program would be the overall programming on the issue.

[6] For the same reasons, we see little advantage in making arbitrary changes in the personal attack rules. No system is perfect, and there may be disadvantages to the present rules. However, proposals made to the Commission to change those rules have their own drawbacks which render them no more acceptable than our present rules. Indeed, Mr. Geller's proposal noted in para. 4, *supra*, merely would add another patch to the "crazy quilt." It ignores reality in accepting the premise that a licensee which "has not achieved fairness or made timely plans to do so" would see the need to do anything at all. The proposal adds delay to the application of the rule, replaces a precise deadline with an undefined "reasonable time," and removes Commission consideration to renewal time. Its net effect would be to prevent the victim of an attack from having an opportunity to respond in a timely fashion. Nor do we see any reason for departing from our present method for dealing with news slanting or distortion. See note 2 and accompanying text, *supra*, and *Columbia Broadcasting System* (Hunger in America), 20 FCC 2d 143 (1969).

discussed in some detail. *Id.* The instant petitions indicate that further explanation would be useful.[7]

19. The Commission does not ordinarily invoke the fairness doctrine on its own motion. Action by the Commission must await a dispute between the complainant and the licensee which is not resolved by those parties. Thus, where the licensee agrees to present opposing views on an issue the Commission need not become involved. However, no specific action is *required* of the licensee until *prima facie* evidence of a violation is presented to the Commission by a complainant. *Allen C. Phelps*, 21 FCC 2d 12 (1969). This policy is part of the delicate balance allocating burdens between licensees and complainants. This policy prevents broadcasters from being burdened with the task of answering idle or capricious complaints. *Report, supra*, at 8.

20. As part of the allocation of burdens and responsibility among complainants, licensees and the Commission, the initial burden has been placed on the complaining party. As stated in the *Fairness Doctrine Primer*, 40 FCC 598 (1964):

> Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.

Id. at 600.

21. In the *Fairness Report, supra*, at 19-21, we discussed the fourth and fifth items mentioned above. The suggestion there that licensees respond to the complainant stating whether there was a controversial issue of public importance leads to the burden placed on the complainant in the second item—specifying the particular issue of a controversial nature discussed over the air.

22. The requirement of specificity was reemphasized in *David C. Green*, 24 FCC 2d 171 (1970), affirmed *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971), where the court recognized that in order to allege that an issue is a controversial issue of public importance the complainant must first define the issue. *Id.* at 329. This requirement is needed so that complainants, licensees and the Commission will have a clearer understanding of the positions of the parties. This is particularly true because once the burden of specificity has been placed upon the complainant, our attention and that of the licensee is then directed to the issue as framed by the complainant. We do not intend to be placed in the position of specifying the alleged controversial issue of public importance in a complaint. It is not the proper function of the administering agency to frame the complaints coming before it and it is incumbent upon the complaining party to bring before us a *prima facie* complaint.

23. After the complainant has presented *prima facie* evidence of a

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[7] For example, MAP proposed that adverse fairness doctrine rulings against a network be applicable to its affiliates. The Commission traditionally has approached networks where a complaint is based on a network program, notwithstanding the fact that fairness obligations "attach to the individual station licensee." *Cf. Letter to Blair Clark, Campaign Manager, McCarthy for President*, 11 FCC 2d 511 (1968). It is settled that even though the TV networks are themselves licensees they respond as networks only and are not responsible for the overall programming of an affiliate on a controversial issue of public importance.

fairness violation, the licensee is called upon to answer an inquiry by the Commission staff which recites the issue specified by the complaint. The licensee is asked whether that issue is a controversial issue of public importance, whether the program in question addressed that issue, and whether other programming has been or will be presented on that issue. The Commission must then decide whether the licensee's responses to these questions are reasonable.[8]

24. Within the parameters of law, the determination of reasonableness in each particular instance is a question of fact. This is true because reasonableness is not an absolute standard, but is situational in nature—rooted in the facts which gave rise to the controversy. *Wilderness Society*, 31 FCC 2d 729, 732 (1971). Reasonableness is also inherently a comparative determination, the actions of a person being measured against a standard by the finder of fact, that standard being the "reasonable man." Therefore, before the reasonableness of one party may be decided, an independent (i.e. comparative) judgment on the question must be made by the finder of fact.

25. This does not mean that the Commission or its staff may substitute their judgment for that of the licensee. A hard look at all the facts and competing arguments is required before the determination on licensee reasonableness. *WAIT Radio* v. *FCC*, 418 F.2d 1153 (D.C. Cir. 1969). This examination is only one step toward that final determination. Having once made its initial examination, the staff then has the responsibility of determining the reasonableness of the licensee's judgment. Rather than substituting its views for those of the licensee, the staff at this stage decides the licensee's reasonableness based on the contentions of all parties and on its own evaluation of the evidence.[9]

C. Standard Product Commercials

26. In the *Fairness Report*, *supra* at 24-8, we declared after much deliberation that the public interest would be served best by not applying the doctrine to standard product commercials.[10] At least two peti-

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[8] Where a licensee poses an alternative issue to that specified in the complaint, such alternative will be considered an implicit denial that the basic thrust of the program addressed the issue specified by the complaint. In such a case the Commission will continue to review the reasonableness of the licensee's denial, considering the alternative issue as evidence concerning the licensee's good faith and reasonableness. Any departure from this policy would render useless the requirement for specificity by the complainant and permit licensees to avoid presenting opposing viewpoints by sophistic distinctions entirely lost on the average viewer. We adhere, however, to our policy in *National Broadcasting Co.* (*AOPA*), 25 FCC 2d 735 (1970), where we found reasonable NBC's denial that its program addressed the issue specified by the complainant. There we looked to the basic thrust of the program and declined to apply the doctrine to sub-issues because if every statement could be made the subject of a separate fairness requirement, the doctrine would be unworkable and the Commission would become involved too deeply in broadcast journalism. *Id.* at 736-7. See also *Gary Lane*, 38 FCC 2d 45 (1972), *Application for Review denied*, 39 FCC 2d 938 (1973).

[9] The Commission's standard of review allows great discretion to the licensee and does not vary depending upon the particular case being reviewed. It has been suggested in the past that we abandon our established standards where the licensee has a financial interest concerning a controversial issue of public importance. That we cannot do. The Commission has adequate means to deal with licensees who use their facilities to gain commercial advantage in other enterprises, and who in other ways abuse their public trust. The fairness doctrine is not the proper vehicle for such enforcement nor is it the most effective. Such over broad use of the doctrine would undermine its effective use where it is most needed. We adhere to the policy set forth in *Public Communication, Inc.*, 50 FCC 2d 395 (1974). To the extent that *WSOC Broadcasting Co.*, 40 FCC 468 (1958), *Springfield Television Broadcasting Corporation*, 45 FCC 2083 (1965) and 28 FCC 2d 339 (1971), and *Pennsylvania Community Antenna Association, Inc.*, 6 R.R. 2d 112 (1965), conflict with this policy they are overruled.

[10] Commercials which simply sell a product and do not deal meaningfully with a controversial issue of public importance.

tioners disagree strongly with this decision and suggest that the Commission was without power to effect such a change, and that it failed to articulate sufficient grounds for the policy. We disagree.

27. The *Report, supra*, articulates the rationale for adopting the policy and its substantive standards, and both the rationale and the standards are well within the Commission's discretion. The Commission clearly stated that the standard was being changed and not ignored, and it set forth a reasoned opinion explaining the change. Indeed, the U.S. Court of Appeals for the First Circuit, in sustaining the Commission, recently determined that the Commission had acted within its statutory authority when it "with appropriate notice and . . . sufficient clarity" concluded that it was in the public interest to "abandon [its] earlier precedents and frame new policies." *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1065 (1975), *cert. denied*, March 22, 1976. The Court went on to say

> Given the necessity of product advertisement in American broadcasting, and the administrative difficulties and costs of determining when a product is so controversial as to trigger fairness obligations, we cannot, merely from the generalized congressional endorsements described in *Red Lion*, say that the Commission acted contrary to statute when it struck the current balance between product advertising and the fairness doctrine.

Id. at 1067.

28. In the *Report*, we concluded that the application of the doctrine to cigarette commercials had been a mistake because it departed from the doctrine's central purpose of developing an informed public opinion. 48 FCC 2d at 24. The extension of the cigarette ruling to other commercials, as in *Friends of the Earth* v. *FCC*, 449 F.2d 1164, compounded the problem, and forced broadcasters and the Commission to balance two sets of commercials "which contribute nothing to public understanding" of the underlying issues. Therefore we concluded:

> In the absence of some meaningful or substantive discussion . . . , we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance.

48 FCC 2d at 76.

Furthermore, we said that the diversion of broadcasters' attention to the fairness implications of ads would hinder their fulfillment of responsibilities to develop informed public opinion in more meaningful ways.

29. Neither have court decisions constrained the Commission from changing its policy after due deliberation consistent with required administrative procedures. See *Public Interest Research Group* v. *FCC*, *supra*. The D.C. Circuit was careful in *Banzhaf* and *Friends of the Earth* to avoid implying that the fairness doctrine or the public interest standard mandated the Commission to make such a finding. In *Friends of the Earth*, the Court expressly noted the pending fairness inquiry, and pointedly suggested that its holding was based only on then-existing Commission policy concerning the fairness doctrine:

> Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

449 F.2d at 1170.

30. The Commission was given inconclusive statistics and told that it should have held a hearing on the economics of broadcasting before

concluding that extension of the doctrine to product advertising would be detrimental to commercial broadcasting. The extensive proceedings in this docket provided more than ample opportunity for that question to be raised. Clearly, however, the economic impact on the broadcasting industry was only one of many factors contributing to our choice of policy, and that factor alone is not of such critical importance as to cause a change of policy. *See*, 48 FCC 2d at 24-27.

D. Free Speech Messages

31. In the *Fairness Report*, *supra*, suggestions for a system of mandatory access were rejected as neither practical nor desirable. In *CBS* v. *DNC*, 412 U.S. 94 (1973), the Supreme Court held that mandatory access is not a matter of either constitutional or statutory right. We are now presented instead with a proposal for an optional access system to be administered by the licensee, and supplemented by the fairness doctrine.

32. The essential requirements for any such system would be that licensee discretion be preserved and no right of access accrue to particular persons or groups. Further the access system would not be permitted to allow important issues to escape timely public discussion. Most importantly, the system must not draw the government into the role of deciding who should be allowed on the air and when.

33. The proposal of the Committee for an Open Media (COM) is the first serious attempt to meet these requirements. It is neither perfected nor ready for adoption as rule or policy. We do not envision that system as a substitute for fairness obligations, but it has the potential to offer a format which acts consistently and complementarily with the purposes of the doctrine. We view Free Speech Messages as a supplement to a licensee's fairness obligations, but we reiterate our view that the licensee is responsible for seeing that important controversial issues are discussed and that opposing viewpoints are provided an opportunity for presentation.

III. *Conclusion*

34. It is hoped that this reconsideration Report and Order will help to clarify the responsibilities and procedures incumbent upon licensees, complainants and the Commission under the fairness doctrine, and the reasons for our policies. We are attempting to balance conflicting constitutional rights by choosing paths which minimize the interference with the rights of either party, and which minimize the role of government in evaluating media performance, consistent with the public interest.

35. Accordingly, IT IS ORDERED, That the petitions for reconsideration ARE DENIED in all respects other than as incorporated in this Report and Order. IT IS FURTHER ORDERED, That the proceedings in Docket 19260, ARE TERMINATED.[11]

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[11] The Commission has decided not to proceed at this time with a proposal by the Chairman for an experimental suspension of the fairness doctrine in larger radio markets.

Separate Statement of Chairman Richard E. Wiley

In Re: Reconsideration of Fairness Report (Docket 19260)

In an address to the International Radio and Television Society on September 16, 1975, I proposed an experiment in which the Commission would discontinue enforcement of the fairness doctrine in the larger radio markets. I believe that this proposal has considerable merit and that it is unfortunate that a majority of the Commission has chosen not to pursue the idea at this time.

There is little reason to believe that fairness enforcement is necessary in the major radio markets. The doctrine, as we all know, is predicated upon the assumption that there is a scarcity of broadcast frequencies and that licensees should not be permitted to monopolize these channels so as to deny the public access to contrasting viewpoints on public issues. In the larger markets, it seems clear that the problem of scarcity is not so significant as to make it likely that radio debate could be monopolized by a single philosophy or point of view. In the Chicago market, for example, there are some 65 commercial radio stations; in Los Angeles the figure is 59; and in New York there are 43 stations. Even in the absence of governmental control and supervision, it seems to me that a wide variety of opinion would be presented in these markets.

The question of the Commission's legal authority to adopt a fairness experiment is somewhat more difficult and complex. Prior to 1959, there would have been no doubt that we had the discretion to conduct such an experiment. In that year, however, the Communications Act was amended so as to refer approvingly to the standard of fairness in broadcasting. The literal wording of the statute indicates only that the Commission's fairness policies were left undisturbed, but the provision has, nevertheless, been widely interpreted to stand as a "codification" or legislative enactment of the doctrine. See, e.g., *Straus Communications, Inc.* v. *FCC*, D.C. Cir. No. 75-1083, January 16, 1976, Slip op. at n. 11 (referring to the provision as amounting to an "explicit statutory enactment").

The Supreme Court, in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1967), stated at one point that the 1959 amendment "ratified" the doctrine (p. 381) and at another point that the language was "merely approving" (p. 384). The question was discussed more recently in the so-called "snowmobile" case. *Public Interest Research Group* v. *FCC*, 522 F.2d 1060 (1st Cir. 1975). In this case, the First Circuit stated that the statutory language is not sufficiently specific to be construed as more than a general endorsement of fairness standards or an approval of the "general tenets" of the fairness doctrine (p. 1066). The Court indicated that questions of "application and accommodation" and of "how and when" the fairness doctrine should be applied should be left to agency discretion (p. 1067). It suggests, further, that these decisions should be arrived at under the general public interest standard and that the Commission's decisions should be upheld unless they are "so plainly inimical to the public interest as to be illegal" (p. 1067).

As indicated, I believe there is ample justification for concluding that a large market fairness experiment would be consistent with the

public interest and, indeed, that it would be in keeping with the "general tenets" of the fairness doctrine itself. We stated in the *Fairness Report*, 48 FCC 2d 1 (1974), that the basic goal of the fairness doctrine, like that of the First Amendment, was "to foster 'uninhibited, robust, wide-open' debate on public issues," quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The whole legal and constitutional tradition of this country teaches us that (except in cases of serious technological scarcity) this goal cannot be advanced by government control of the media. It seems clear to me, therefore, that a radio experiment (in markets where scarcity is not a serious practical problem) would serve the purposes of both the First Amendment and the Commission's fairness doctrine.

While I recognize the fact that there is room for debate concerning the meaning of the 1959 amendments to the Act, I nevertheless believe that it would be desirable for the Commission to initiate a public inquiry which would afford interested parties an opportunity to comment on the question of our legal authority, and also examine the appropriate size and scope of an experiment. I am hopeful that, in the not too distant future, the Commission or the Congress will look more favorably on the idea of reforming the fairness doctrine so as to apply it only in circumstances where there is a realistic need for government regulation.

It has been suggested that, while the Commission may not be moved to cut back on the fairness doctrine (as suggested by my experiment), it might nevertheless explore certain alternatives to the traditional fairness principles and procedures. In this regard, the proposal of the Committee for Open Media that we allow "access" as an option in lieu of fairness has attracted some attention and support. Under the proposed system, any station which would agree to carry a reasonable number of "Free Speech Messages," and which would set up a mechanical formula for the selection of spokesmen, would be relieved of its fairness obligation to assure that contrasting views on particular issues are reasonably represented.

I do not believe that stations should be encouraged to abdicate editorial control in the fashion suggested by this proposal. The plan calls for heavy emphasis on a single programming technique: the access announcement. In my opinion, a more varied, interesting and informative coverage would be possible if professional journalists played a conscious and positive role in the process. It seems inescapable that editorial supervision would result in a presentation which is more coherent and enlightening than we could expect from a series of random and unstructured individual appearances. Despite its problems, the present fairness system is, in my opinion, preferable to the alternative which has been suggested.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Reconsideration of Fairness Doctrine Report (Docket No. 19260)

I have carefully considered the comments filed in this proceeding, and my bottom line, if you will, continues to be a whole-hearted en-

dorsement of the Fairness Doctrine.[1] While comparisons with the print media are academically interesting, numerical comparisons showing a greater number of broadcast media than newspapers for purposes of negating the "scarcity" arguments—assumed by some to be the *raison d'etre* for the Doctrine—are unimpressive to me. The fact remains, as pointed out in *Red Lion Broadcasting* v. *U.S.*, 395 U.S. 367, 388 (1967) that ". . . there are substantially more individuals who want to broadcast than there are frequencies to allocate." This fundamental condition more than neutralizes any "relative scarcity" contrasts with newspapers; there is an "absolute scarcity" of broadcast media outlets, which phenomenon is inapposite to the printed press.

And, in light of court decision holding that the Doctrine has been "statutized" by the recodification of Section 315 (47 U.S. § 315)[2] and may even amount to a Constitutional imperative, see *Red Lion*, *supra*, the debate over its very existence should probably trail off into discussions about appropriate application.

In that connection, I join my majority colleagues in their decision to invoke the Doctrine in timely fashion. Delay of such invocation would unfortunately render moot most issues within the Doctrine's purview and effectively castrate the purpose for which it stands; that is, the public's right to be informed on an issue. Paramount is not our right to take recriminatory measures against an offender.

Where I depart from my colleagues, as I did previously, is the decision to continue to apply the Doctrine to product commercials.[3] As I see it, continued application will again create a series of inconsistent rulings, on the question of what constitutes an "obvious and meaningful discussion of a public issue" and such judgments, by their nature, are predominantly subjective. Instead, I would have established an access requirement of a fixed percentage of overall commercial time

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[1] For a fuller explanation of my views, see my separate statement upon our previous disposition of the matter, 48 FCC 2d at 52 (1974).

[2] *E.g. Straus Communications, Inc.* v. *FCC*, D.C. Cir. No. 75-1083 January 16, 1976, Slip Op. at n. 11.

[3] Exemption of product commercials from the Fairness Doctrine was recently applauded in Simmons, *Commercial Advertising and The Fairness Doctrine: The New FCC Policy in Perspective*, 75 COLUM. L. REV. 1063 (1975) where the author called prior applications of the Doctrine to ads a "crazy quilt" (*id.* at 1089) and concludes:

> During the late 1960's and early 1970's the FCC began to apply the fairness doctrine to broadcasting advertising. The Commission and the courts set down a string of inconsistent and confused precedent as they attempted to grapple with a growing number of fairness complaints directed at commercial advertising.
>
> In 1974, the Commission completed a reevaluation of the fairness doctrine and issued its Fairness Report. The Report states that institutional advertising may raise fairness doctrine issues only if the issues are explicitly and meaningfully addressed. The Report's language can be interpreted to mean that it will be more difficult to file successful fairness complaints based on institutional advertising, and it has been suggested in these pages that it should be so narrowly construed. The difficulty of interpreting these advertisements, the lack of clear guidance, and the first amendment rights of broadcasters all call for such a conclusion.
>
> The 1974 Report also signalled a major change in F.C.C. policy by exempting ordinary product and service advertisements from fairness doctrine obligations. This policy change should be applauded by even the severest critics of product advertisements. At its best, the fairness doctrine-product advertising marriage only attempted to replicate other more effective means to police product commercials and give the American people vital consumer and environmental information. At its worst, it created a quagmire of precedents which potentially undermined the economic foundation of the broadcasting industry and threatened the first amendment interests of broadcasters and the public alike.

Id. at 1120. While this conclusion may be over broad since we did not fully "exempt" product commercials (only those that do not "obviously and meaningfully address a controversial issue of public importance"), it does lend support to my argument.

and permitted "counter-commercial" spokesmen to present responsible rebuttals to explicitly or implicitly controversial ads.[4] We, then, would be out of the day-to-day commercial operations of our licensees which is, I believe, the better place to be on these matters.

With respect to the access principle generally, and notwithstanding my support—in the main—for the Doctrine's present form, I would have little difficulty in experimenting with the alternative suggested by the Committee for Open Media and would not mind testing the "access is fairness" postulate.[5] With respect to the mechanics, I would associate myself with the considered views of my erudite colleague, Commissioner Glen Robinson, and believe, as he does, that the problems presented by this alternative would be no more "difficult" to administer than those presently posed.

Dissenting Statement of Commissioner Glen O. Robinson

I. *The Vulnerability of Venerability*

Now over a quarter century old, the fairness doctrine has become one of the venerable institutions of FCC jurisprudence. Unlike some venerable institutions, however, old age has hardly secured the fairness doctrine from the tarnish of corrosive controversy. On the contrary, age seems to have increased, not diminished, critical doubts about the doctrine—its purpose, its effects, is value. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), which put the Supreme Court's inprimatur on the legality of the fairness concept, has not set these doubts to rest. Indeed, the Court's subsequent decision in *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 251 (1974), has raised new doubts and fresh concern.

I agree with the Commission's conclusion that *Red Lion* is still good law, although *Tornillo* clearly does undermine the foundations on which *Red Lion* appeared to rest. The original *Red Lion* decision assumed (1) that the imposition of an obligation of fairness (including a private right to reply in certain instances) did not restrain ("chill") free speech, but actually served to promote it by ensuring greater diversity; and (2) that because the broadcast media operated under conditions of physical scarcity, the marketplace could not be relied upon to produce adequate diversity of speech and, therefore, some forms of regulation, such as the fairness obligation, were appropriate, and necessary. Clearly, *Tornillo* repudiates the first assumption of *Red Lion*. Logically at least, this conclusion is necessary; otherwise there is no basis for the Court's invalidating the right of reply statute in that case. Can *Red Lion* stand on the second assumption independent of the first? I have some doubts whether it can as a matter of pure logic, for I do not think the condition of scarcity is a compelling basis for distin-

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[4] See n. 1, above.

[5] For those who are happier in seeking parallelism between the print and broadcast media, the access alternative should be seen as a sort of electronic "op-ed" page carried by virtually every newspaper worthy of the title. While such is not obligatory on newspapers as a matter of law, *cf. Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 251 (1974), as a matter of custom and unwritten law most newspapers would be hard pressed to eliminate its "Letters to the Editor" column. Hence, the access substitute should be embraced by those who argue for no First Amendment distinction between the press and FCC licensees. If anybody does argue against Fairness *and* access, he is arguing essentially for undiluted unfairness and propaganda. As for me, "that dog won't hunt."

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guishing between electronic and print media[1]—particularly on the finding made in *Tornillo* that a compulsory right of reply tends to reduce public debate, contrary to the purpose of the fairness doctrine.[2] Nevertheless, however the logic of the matter may appear to me, I am forced also to admit that it appears to appear differently to the Supreme Court; as recently as two months ago, the Supreme Court indicated (albeit in dicta) that it still regards *Red Lion* as good law. See *Buckley* v. *Valeo*, —— U.S. ——, 96 S. Ct. 649, n. 55 (1976).

The question remains whether, constitutional issues aside, the doctrine could nevertheless be repudiated by the Commission. I once thought so,[3] but the Supreme Court appears to have disagreed. In *Red Lion* the Court said:

> "that Congress in 1969 [intended] that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard."

395 U.S. at 380. See also *Straus Communications, Inc.* v. *FCC*, —— F.2d ——; No. 75-1083, Slip Opinion, p. 10, n. 11 (D.C. Cir., Jan. 16, 1976). It thus seems to be beyond our power to eliminate altogether the *general* requirement that licensees give a reasonably balanced pre-

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[1] See, e.g., Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 88 (1967). See also Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967), who argues similarly but draws inferences the opposite of mine, concluding that the print media should be subject to some kind of fairness doctrine. *Tornillo*, of course, chilled that idea.

[2] In *Tornillo* the Court found the Florida right of reply statute to have such an effect, reasoning as follows:

> "The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.
>
> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 279, 84 S. Ct. at 725."

418 U.S. at 256, 257. It should be noted that this reasoning applies with even greater force to broadcasters inasmuch as there are (by the Court's acknowledgment) greater "technological limitations" on the time which they can devote to meeting the obligation (therefore, by the Court's reasoning, higher cost and correspondingly greater incentive to "play it safe"). On the reasoning of *Tornillo* it is thus difficult to see that scarcity supports the fairness doctrine since the presumed necessity to compensate for inherent limitations on diversity which such scarcity creates aggravates the chilling effect.

[3] The question turns on the interpretation of the following language of the 1959 amendments to Section 315 of the Communications Act:

> "Nothing in the foregoing sentence [setting forth certain exemptions from the equal time provisions] shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

I argued in my 1967 article (*supra*, footnote 1 at 134) that this language need not be read to codify the fairness doctrine, and that it is better understood simply as a clarification that Congress did not intend, by creating exemptions from the equal time obligation, to disturb the status quo so far as the fairness doctrine was concerned. Under this reading, the clause "and to afford reasonable opportunity . . ." would be read disjunctively rather than conjunctively with the preceding clause. This reading of the statute, which conforms with the legislative history, see Hazell, *Legislative History of the Fairness Doctrine, Staff Study for the Committee on Interstate and Foreign Commerce*, 92d Cong. 1st. Sess. 21-31 (1969), would preserve our discretion to abandon or alter the administration of the doctrine.

sentation of controversial public issues. However, I do not interpret *Red Lion* (or *Straus*) as depriving the FCC of all power to reshape the rule according to changing perceptions of the public interest.[4] While our discretion is circumscribed, I think we still have freedom to redefine how the basic fairness obligation may be satisfied by licensees. Given the Commission's action in narrowing the scope of the doctrine to exclude routine commercial product advertising from its coverage—an action with which I wholeheartedly agree[5]—my colleagues evidently agree that some reshaping of the doctrine is still within our power.

The majority and I part company on whether that power should be exercised to seek alternatives to the present formulation of the fairness doctrine. In contrast to the Commission's evident satisfaction with the present fairness doctrine, I believe it has proved to be unworkable and, at least potentially, dangerous—raising public expectations that cannot be fulfilled within the limits which the First Amendment places on our oversight of electronic journalism. Accordingly, within the limits of our discretion under Section 315, I think we should explore alternative possibilities for achieving the underlying goals of the fairness doctrine.

II. *The Right to Speak versus the Right to Hear*

Before turning to a critique of the fairness doctrine, a brief note on First Amendment philosophy is appropriate, for it is my belief that much of the debate over the fairness doctrine is needlessly clouded and misdirected by superficial and sophistical reasoning about the free speech ideal. The Commission begins its defense of the fairness doctrine on a high constitutional plane, quoting from *Red Lion:*

> "There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that '[i]t is the right of the viewers and listeners, not the broadcasters, which is paramount.' "

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[4] See *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1066–67 (1st Cir., 1975) (affirming Commission change in the fairness doctrine as applied to commercial advertising). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 131, 132 (1973), where the Court concludes its discussion on the FCC's continuing investigation of the best feasible use of the broadcast band for the discussion of important matters by cautioning that "courts should not freeze this necessarily dynamic process into a constitutional holding."

[5] I will not elaborate in detail on the commercial advertising aspect. For a recent, detailed critique in Simmons, *Commercial Advertising and the Fairness Doctrine: The New FCC Policy in Perspective*, 75 Colum. L. Rev. 1063 (1975). Suffice it to say that I long ago thought the Commission's extension of the fairness doctrine to cigarette ads (see *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)) was a feckless venture that the Commission would come to rue, for it would not be, and could not be, contained. See *Hearings on the Fairness Doctrine Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., ser. 90–32, p. 53, 56 (1968). The Commission's futile effort to limit the application of *Banzhaf* (see *Friends of the Earth* v. *FCC*, 449 F.2d 1164 (D.C. Cir. 1971)) has confirmed this conclusion.

The problem here is generally similar to that which has beset administration of the fairness doctrine elsewhere: if fairness requirements are to be meaningful, they must be enforced with a vigor and a regularity that would require a degree of government supervision that would be unwise. Indeed, such a level of control might also be unconstitutional for, as recent decisions make clear, commercial advertising does enjoy *some* degree of First Amendment protection. See *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Virginia Citizens Consumer Council, Inc.* v. *State Board of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris noted*, 95 S. Ct. 1389 (1975); *California State Board of Pharmacy* v. *Terry*, 396 F. Supp. 94 (N.D. Cal. 1975), *appeal filed* 9/2/75, 44 U.S.L.W. 3155 (9/23/75). Confronted, on the one hand, with the necessity of extensive control in order to effect even-handed enforcement or, on the other hand, with the equally unattractive alternative of pursuing selective and arbitrary enforcement, the Commission has wisely chosen to make a clean break (more or less; product advertising may still be within the doctrine in exceptional cases where viewpoints on controversial public issues are explicitly discussed) with past folly. Would that it were possible to do this with the entire fairness doctrine.

Insofar as this dictum is intended merely to express the traditional utilitarian notion that free speech is protected not only in the interest of the individual speaker but also that of the broader social interest of the public as listeners, the "listener's right" theory is unexceptionable. Similarly, as a simple (if rather elliptical) statement that "free speech" is subject to some restrictions "in the public interest," it can pass without protest, at least pending the review of the specific restrictions imposed. But inasmuch as the above formulation suggests some general principle that the *First Amendment* gives positive rights to listeners/viewers to dictate what speakers shall tell them, I believe it is pregnant with mischief.

I concede that freedom of speech is conducive to social welfare (a small concession), and it is generally that social interest which underlies the constitutional protection. But I reject the notion that only speech which promotes government or social welfare policies in a narrow sense is worthy of constitutional protection;[6] and, in the same vein, I disagree with the implication that the First Amendment is a tool of social policy, to be used and interpreted in an activist, affirmative way which promotes the "spirit" and "purpose" of free speech—the view put forward, for example, in *Business Executives Move for Vietnam Peace* v. *FCC*, 540 F.2d 642 (D.C. Cir. 1971), reversed *sub nom.*, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Such an instrumentalist view of the First Amendment effectively reduces the constitutional guarantee of free speech to the same standing and dignity as that of any conventional governmental policy. See *Columbia Broadcasting System, Inc.*, *supra*, at 132, 133 (concurring opinion of Justice Stewart). Therein lies the vice of the listeners' rights theory. If the speaker truly has the right to hear, it follows (from Hohfeld[7] and from common sense) that the speaker has a correlative duty to speak. If a listener has a legal right to hear certain things for certain purposes, then a speaker—some speaker—must have correlative duty to speak to those things. On this theory the people have the right to determine what the speaker shall say—in order to serve the "spirit" of the First Amendment to advance the social welfare of "the people."

Once it is explained in this way, it becomes apparent why the listeners' rights theory has not taken hold as a general theory of the First Amendment and, indeed, appears to have now been at least impliedly repudiated even for the electronic media.[8] As a general conception, the

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[6] Alexander Meiklejohn, one of the most admired modern theorists, insisted that the First Amendment protects *only* "public" speech of a kind useful to self government. A. Meiklejohn, *Free Speech and Its Relation to Self Government*, 61-63 (1948). As a corollary of this general proposition Meiklejohn excluded commercial broadcasting from his narrow sphere of relevant speech, on the apparent ground that profit-making was incompatible with free speech. A. Meiklejohn, *Political Freedom*, XV (M. Sharp, ed. 1960) (foreword by Malcolm Sharp). Given Meiklejohn's very narrow conception of the value of free speech and the role of the First Amendment, I find it extraordinarily curious that he should enjoy such a high reputation as a libertarian. His views, if adopted, would sweep away the better part of all the positive First Amendment jurisprudence which has developed in the past score years, not only in the field of mass communications, but elsewhere.

[7] Hohfeld, *Some Fundamental Legal Conceptions As Applied to Judicial Reasoning*, 23 Yale L.J. 16, 31-32 (1913).

[8] *Tornillo* must be considered an implied repudiation of the theory so far as the print media are concerned; and with respect to the electronic media, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* seems basically hostile to the theory. Thus, the listeners' rights theory seems to have no real vitality except as a rhetorical bow to the unexceptional notion that free speech does not totally supplant the rights of the people at large to exercise their sovereign powers.

listeners' rights theory makes nonsense of the First Amendment; in fact, it stands it on its head. The First Amendment may indeed belong to everybody—as the listeners' rights theory suggests—but it cannot truly belong to everybody unless it first belongs to each and every particular somebody. To deny the individual right in the name of the collective right transforms the First Amendment from a guarantee of individual freedom into its very opposite, rule by public clamor. To be sure, this interference is intended to further the "spirit" and "larger purposes" of the First Amendment. For my part, however, I prefer to entrust my political freedoms to the Constitution rather than to the ardent schemes of well-meaning persons.

In summary, we err when we stray beyond the simple proposition that the First Amendment is a *restraint* on government—nothing less, but also nothing more. Of course, it does not follow from this that the First Amendment restrains every act of government touching free speech (whether that action is intended to further free speech, to restrain it, or is neutral with respect to it). Thus, rejection of the listeners' rights idea expressed in *Red Lion* would not *necessarily* alter the decision, but it would, at least, have the clear virtue of removing from the debate over fairness the misleading and mischievous notion that the First Amendment is an expression of the right of the public, through their government, to regulate speech in the interest of listeners.

III. *The Concept of Fairness*

I assume no one has any serious difficulties either with the concept of fairness or its applicability to the communications media. It is the administration of that idea, as legally obligatory conduct, which creates the hard problems. As Lewis Carroll reminds us, the linguistic barriers on the way to resolving a problem may be the most difficult to pass. In *Through the Looking-Glass*, Alice and Humpty Dumpty are debating how words mean what they mean:

> "I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"
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> "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
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> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Through the Looking-Glass 94 (Random House ed., 1946). As with "glory" so with fairness: the important question is not *how* the word is to be defined but *who* is to be master. The idea of obligatory fairness includes the idea of a standard of conduct external to the speaker, against which his conduct is to be measured. In short, unlike Humpty Dumpty, a speaker who is obligated to be "fair," according to the definition of another, is not completely master of his own will. That is the problem. It is not simply that the need for enforced fairness is difficult to determine, but the fact that someone other than the speaker has the task of determining it. Particularly is this the case where that "someone" is a government agency with far-reaching en-

forcement powers, including sanctions like fines or license revocation, at its disposal. We must consider a second question—

We must therefore consider the question of the cost of mandating "fairness". That cost, of course, is the risk that government-mandated fairness impedes ("chills") speech. Clearly we are in the land of shadows here, for it is hard to prove that an enforceable fairness obligation has an adverse impact on a robust free press. The Supreme Court has been of two minds on whether such an impact is reasonably to be feared. In *Red Lion*, the Court found no reason to think that the fairness doctrine would discourage free speech by broadcasters;[9] but in *Tornillo*, it found the opposite would hold for the print media.[10] Those cases are difficult to reconcile. In neither was there any specific evidence of effects. Thus, as in other First Amendment cases,[11] reliance had to be placed on certain general assumptions. What justified the different assumptions about the respective impact on the different media? The technological differences between the two seem clearly insufficient to explain the different assumptions about the impact of enforced fairness.[12] However, whatever the differences between the media of mass communications, the central point in either case is whether such obligations can have a tendency to impede free speech. Without suggesting that the answer is undebatable, it seems clear enough that reasonable people can, and plainly do, believe there is a significant risk of such a tendency.[13] It may be that this possible inhibition is an acceptable cost when compared with the promised benefits to be derived from fairness. That evidently is what *Red Lion* decided for purposes of sustaining the constitutionality of the fairness doctrine. However, within our discretion to shape and modify the doctrine, we ought to continue to consider whether the possible benefits of fairness outweigh the possible costs.

Measuring the benefits of fairness is as difficult as assessing the costs. The expected benefits are simply described: increased diversity

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[9] On the contrary, the Court found that the Commission's fairness rules would "enhance rather than abridge the freedoms of speech and press protected by the First Amendment. . . ." 395 U.S. at 375.

[10] See footnote 2, *supra*.

[11] "[W]e have never . . . demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist . . . [nor] required proof of the exact number of people potentially affected by government action, who would actually be dissuaded from engaging in government activity.

"Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or impairment of the First Amendment activity), and (2) whether the effect would occur with some regularity, i.e., would not be de minimis. * * * And in making this determination, we have shown a special solicitude towards 'indispensable liberties' protected by the First Amendment. . . ."

Branzburg v. *Hayes*, 408 U.S. 665, 734–35 (1972) (Stewart, J., dissenting). See also *New York Times Co.* v. *Sullivan*, 376 U.S. 255 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). The last two cases are particularly noteworthy in this regard insofar as they rest on the premise that even relatively slight burdens on journalism may have sufficient impact to justify a finding of unconstitutional impediment to free speech. This also appears to be the premise of *Tornillo* but not, as noted above, of *Red Lion*.

[12] Indeed, as pointed out in footnote 2, *supra*, on the reasoning of *Tornillo*, the chilling effect of enforced fairness in broadcasting is greater than in the print media since the scarcer the resource, the greater the cost of requiring portions of that resource to be devoted to meeting fairness (or public access) obligations—hence the greater the "chilling effect."

[13] The risk, of course, is not simply or even primarily that the government will itself directly control speech (though that possibility cannot be totally discounted). It is rather that the media themselves will find it expedient to avoid controversial matters which might give rise to difficulties with the government. Therein lies the chilling effect of government interference. See footnote 2, *supra*.

of viewpoints and greater balance in airing controversial public issues. If we can really obtain these desiderata, fine; but the question is whether they *can* be obtained through the use of the fairness doctrine. This consideration is the crucial one—and it has been somewhat slighted in the debate over fairness. Even if the risks of inhibiting free speech are slight, whether they are worth incurring turns not merely on the importance of the benefit sought, but also on the likelihood of achieving it. *Cf., United States* v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). A clock that cannot keep time is no bargain even at garage-sale prices, unless it is esteemed as an ornament.

Can the Commission's fairness clock keep time, or is it merely an ornament? I am skeptical—and I become more skeptical with time—that this aging timepiece is anything more than an *objet d'art*, and at that, more *objet* than art. I do not think this Commission can in practice define "fairness" with sufficient clarity to enforce this norm as law. To be sure, there are some steps we "could" take, in theory, if we were willing. But we can in theory do many things that, in practice, we will not do, and should not do. One of these things is to second-guess licensee judgments on fairness, except in the most extraordinary cases. In a two year period, 1973 and 1974, the Commission received 4,280 formal fairness complaints. Of these only nineteen—4/10 of one percent—resulted in findings adverse to the licensee.[14]

Adverse findings, few and far between in the past, are likely to be even more exceptional in the future as a consequence of *Straus Communications, Inc.* v. *FCC*, —— F.2d ——, No. 75-1083 (D.C. Cir., Jan. 16, 1976) and *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101, 1117-1122 (D.C. Cir. 1974) ("Pensions") (opinion of Leventhal, J.), *vacated*, etc., at *id.*; *cert. denied*, 44 U.S.L.W. 3464 (2/24/76), which explicitly caution that the First Amendment requires the agency to defer to the licensee's judgment unless it is found to be unreasonable or in bad faith. The court, in *Straus*, underlines this point by noting that the "unreasonable/bad faith" standard "applies to all components of the doctrine; it is the licensee, in the first instance, who decides, for example, exactly what issue is involved and whether that issue is controversial and of public importance." (Slip Opinion at p. 14).[15]

Data on the small number of adverse findings are frequently cited to show how small is the risk to licensees of government interference.[16] What they show even more persuasively, however, is how small are

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[14] This is the latest period for which complete data were readily available. Violations in this period included: seven violations of the political editorializing rules, seven personal attack rule violations and five general fairness doctrine rulings.

[15] Both in *Straus* and in *Pensions*, the court's language indicates that the standard by which the FCC reviews licensee discretion is similar to the standard by which the courts review the work of the agency. It is not enough, in order to disturb the licensee's conclusion, to find that the preponderance of evidence favors a different result from that reached by the licensee. Nor is it enough to find that the complainant's identification of the issue (and whether it was controversial and of public importance) is more sensible than the licensee's version of the story. The licensee's conduct must actually be unreasonable before its discretion may be rejected by the Commission. See *Straus*, Slip Opinion at 14-15; *Pensions*, 516 F.2d at 1120, 1122-23.

[16] I am not at all certain that the data will support that conclusion since the degree of the "chill" on free speech that may flow from government intrusion is not simply a function of the number of adverse findings or even the number of inquiries made of licensees. The chill stems from the licensee's perception of the costs of presenting certain programs, and those perceptions may be based more on anxiety than on any objective, actuarially sound, assessment of risk. In any case, the more immediate concern of the licensee will be whether the marginal benefit of broadcasting matter bearing on a controversial public issue outweighs the possible battling with citizen groups, disgruntled viewers/listeners, and last, but not least, the FCC.

the benefits. That there were only nineteen adverse findings in two years[17] bears witness to one (or more) of three things: (1) incredible fairness by the media; (2) remarkably ineffective enforcement by the FCC; or (3) a standard of licensee discretion so broad as to permit almost any judgment to stand. On the first assumption, the fairness doctrine seems to me unnecessary; on the second and third, it is ineffectual.[18]

Innate suspicion tells me the first assumption is unlikely: I just cannot believe that with several thousands of licensees and millions of broadcast hours yearly, the fairness doctrine does not suffer many more violations than those few found. The second and third assumptions are interrelated. The FCC's enforcement of the fairness doctrine has always been less than rigorous. In the face of increasing demands to redress fairness grievances the Commission has evolved procedural barriers, such as the "Phelps Doctrine," see *Alan C. Phelps*, 21 FCC 2d 12 (1969), in order to forestall becoming too easily involved in licensee programming judgments. And, where we have become involved, we have, with few exceptions accorded the licensee broad discretion to define what constitutes a controversial issue of public importance, and almost equal latitude in satisfying the obligation of fairness with respect to such issues. While some critics have accused the FCC of lassitude or worse in its enforcement, I do not see how the Commission could be more rigorous in its demands upon licensees without undertaking a course of program surveillance that would almost certainly run afoul of the First Amendment. It is not so much that it is impossible to define and enforce fairness obligations (though at best it is a difficult task), but rather that it is not possible to do so in a meaningful way without interfering in programming outside the intended focus of our enforcement. Judicial confirmation of this is suggested by the recent reversals of Commission decisions in the *Straus* and *Pensions* cases for failure to give sufficient discretion to licensee judgment.[19] I do not quarrel with those court decisions, but it should be emphasized

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[17] An adverse finding is not necessarily followed by a separate punishment; indeed, usually it is not. Most adverse findings result either in a ruling that certain programming requires presentation of another viewpoint or a letter admonishing the licensee to comply with the fairness doctrine. Of the nineteen adverse findings in 1973 and 1974, only eight (seven political editorial cases and one personal attack) resulted in any tangible punitive action—forfeiture in each case. Of course, the forfeiture penalty is available to the Commission only in the case of personal attack-political editorializing violations inasmuch as these alone have been crystallized into specific rules. As for the ultimate sanction, non-renewal of license, the Commission will not consider this except in the most egregious case of licensee irresponsibility towards its fairness obligation, and it has found this but once, in *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d 18 (1970), *aff'd.* 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). (Parenthetically I might note that licensee misconduct such as that found in *Brandywine* might make one a believer in the fairness doctrine were it found more often. As it is, however, I think it hard to justify this, or any other rule, by the most extreme, and most rarely encountered, case.)

[18] Of course, the deterrent effect on all licensees of making an example of a few of them cannot be overlooked. But the proper limits to the practice of "making an example" of someone are rapidly reached. See Andenaes, *The Morality of Deterrence*, 37 U. Chi. L. Rev. 649 (1970). As a rule of elementary justice, a person can be so used only if he is first guilty of some misconduct. The idea of guilt, in this sense, includes the idea that A has done something which he should not have done, and which others similarly situated have refrained from doing. I doubt, as I have mentioned, that the average licensee who is found to have violated the fairness doctrine has done something which other licensees have refrained from doing. The old maxim, "Beat your boy every day—if you don't know what for, he will," may serve a purpose as a primitive rule of childrearing, but it is no way to run a government.

[19] *National Broadcasting Co., Inc. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974); *Straus Communications, Inc. v. FCC*, —— F.2d ——, No. 75-1083 (D.C. Cir. Jan. 16, 1976).

that the agency actions which prompted them were exceptional.[20] This underscores my point about the futility of enforcement. The implication which I draw from these cases is that even the current level of enforcement—which results in adverse findings in less than one half of one percent of the cases—may be too high! At this point it surely must occur even to supporters of the fairness doctrine to ask whether the game is worth the candle.

The situation is untenable. The very existence of the fairness doctrine has given rise to public expectations that are quite unrealistic. The volume and the character of fairness doctrine mail which the Commission receives bears witness to such expectations. The Commission cannot come close to meeting those exaggerated expectations without infringing the Constitution; indeed, it apparently cannot even continue its own very limited enforcement course if I correctly gauge the direction of the prevailing judicial winds.

IV. *Alternatives*

Given the infirmities of the fairness doctrine, it is time to start looking for alternatives. My preferred course—retiring the fairness doctrine altogether—is presumably beyond our power unless and until the Supreme Court reverses or reinterprets *Red Lion*. A second possibility is simply to forget about enforcement. But as I have argued above, this is about what we have done in effect, with an occasional exception; I regard this course as totally unsatisfactory. It breeds disrespect for the law. Worse, it is an unstable state, which produces not desuetude, but erratic (and hence discriminatory) enforcement. Just as nonenforcement is not a practicable option, so too is the similar proposal of Mr. Henry Geller to relegate enforcement of the fairness doctrine to the end of the license period. Under the Geller proposal the Commission would revert to its earlier (pre-1962) practice[21] of examining the licensee's overall fairness as part of its three year performance record rather than, as now, evaluating individual complaints. I concur in the Commission's rejection of this proposal. I am sympathetic to what I discern to be the purpose of this proposal, to eliminate detailed scrutiny of, and interference with, licensee news judgments. However, I do not think Mr. Geller's proposal would necessarily work as he supposes. In fact, I think the Commission would still ultimately be led to responding to particular complaints as it does now, except that its response would be to an accumulation of complaints—most of them on a stale record. If this were the outcome of such a proposal, it could increase the problem of discriminatory enforcement, and also aggravate the risk of adverse impact on licensee news judgments. The accumulation of complaints, the uncertainty of how they would be regarded, the increased scope of Commission scrutiny and finally the greater ultimate sanction to the licensee with a license renewal at stake (as opposed merely to an adverse finding of the kind now typically made in cases of violation), could increase the chilling effect of

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[20] The exceptional character of the findings may, in fact, be additional reason to challenge the actions insofar as it evinces erratic (and hence discriminatory) enforcement. See my dissent in *Straus Communications, Inc.*, 51 FCC 2d 385, 389 (1975).

[21] The change in practice, the Commission's rationale for it, and Geller's critique, are discussed in *Pensions, supra*, 516 F.2d at 1115-16.

the fairness doctrine.[22] In return for these new risks the Geller proposal offers no significant additional benefits in terms of surer enforcement, or more probable achievement of fairness. As has been explained, this last aspect is a crucial flaw in the present fairness doctrine: against the risk (however slight it may be) of adverse effects, the actual benefits are, as a practical matter, negligible.[23]

In my view a more attractive alternative to either the present process or the Geller option is the optional access-in-lieu-of-fairness proposal of the Committee for Open Media (COM).[24]

COM suggests a system of optional access in lieu of the fairness doctrine. Instead of being required to program discussions of controversial matters of public importance in a reasonably balanced manner, licensees might instead be allowed to choose to set aside time to allow members of the public to appear on the air.

As an alternative to what we have now, the access idea is appealing; by automating the process for permitting different views to be expressed, the subjective determinations that are now the core concern would be largely eliminated.[25] I am not an admirer of access in and for itself, and for this reason have never supported the idea of mandatory access, *per se*. But mandatory access is not the issue here. The question is not whether a public access period is good, but whether it is better than what we now have. In fact, even the latter formulation is somewhat beside the point for the proposal is not to compel access in lieu of fairness, but to permit the licensee to opt for it.[26] There is reason to doubt that many licensees would select access over their present fairness obligations. But that is no concern of ours. To permit the substitution would at least give those licensees who are troubled by the fairness doctrine (or who may feel "chilled" by it) an opportunity to opt out in favor of an alternative that at least minimizes the risk of vexing the FCC.[27]

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[22] It must again be emphasized that the adverse impact on speech derives not so much from what the Commission actually does than from the licensee's apprehension of what the Commission might do.

[23] It is not decisive counter to the above objections that the Commission once "enforced" the fairness doctrine as Geller now proposes. That was over a decade ago—almost in the paleolithic era of the fairness doctrine—when there was far less consciousness of this doctrine by the public or licensees. I doubt very much that the Commission could restore those relatively halcyon days simply by adopting the old process.

[24] The notion of mandated access has received much attention on both sides. For a bibliography and critique, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N. Car. L. Rev. 1 (1973). However, I am not familiar with any discussion in the general legal literature of this particular scheme of access.

[25] The access option would be more or less self-enforcing though there would possibly be some occasions for subjective determinations by the licensee and this, in turn, would require some supervision by the Commission, hopefully minimal.

[26] Because under this proposal access would be optional with the licensee, it would be entirely consistent with *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* which involved the question whether access was required by the First Amendment or the Communications Act. It is also, I believe, consistent with the *Red Lion* holding that Congress incorporated the basic fairness obligation into Section 315. As discussed earlier, I do not think that was intended to freeze the fairness obligation precisely in its present form. See *CBS* v. *DNC*, 412 U.S. at 131-132; *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1064.

[27] Under the COM proposal, access would not be a surrogate for the present fairness doctrine in cases of "editorial advertisements" on controversial public issues. The rationale of the exception is to "prevent powerful private interests from disserving the public interest by propagandizing their ideas in a blitz paid spot campaign without comparable response capable of being afforded through the access system." Committee for Open Media, Petition for Reconsideration, p. 18. This fear is probably exaggerated, but there should be no objection to this exceptional retention of the traditional fairness doctrine.

At the outset it would be necessary to prescribe clear guidelines of how such an access alternative would work. COM proposes so-called "free speech messages"—short radio or television spots made available to any number of the public. Under this approach people could then get air time to criticize the fairness of the station's news or public affairs programming, or to talk about anything else that deserved public notice. Some administrative problems come to mind immediately. How much time must be allocated, and in what time periods, in order to exempt the licensee from its traditional fairness obligation? How are speakers to be chosen, assuming that more will want to speak than time can reasonably be provided for? Should stations have at least a minimal role in selecting the speakers?

These questions are not so difficult; but to a degree, their answers proceed on faith. If the Commission were to allow access as an alternative to fairness, it would be simple to frame rules requiring that access messages be aired at times throughout the day when significant segments of the viewing public were watching.[28] Likewise, the FCC could provide by rule that speakers be chosen, either by lot or by queue, so as to minimize broadcaster bias and ensure that each chosen speaker was allowed to go before the public within a reasonable period—say a week—after requesting access time.[29] The third point is related to the second. Whatever means of allocation were chosen would have to prevent monopolization by any one group. COM resolves the problem by providing that half the spots would be allocated by the licensee to representative speakers. But no allocation system to which our attention has been directed can completely automate the selection function or remove the practical need for a supervisory intelligence of some sort—at the very least to monitor what goes over the air to ensure that it is not defamatory nor obscene.[30] Obviously, the pressure of this supervisory intelligence re-introduces the problem of licensee bias. But it would be a lesser problem than the one we have now. Certainly, it seems intuitively obvious that, if a licensee threw himself open to all comers (or a random selection of all comers) who fell somewhere in the zone of reasonableness, a greater diversity of viewpoints would more probably be represented than where the licensee himself generates the entire broadcast agenda. To be sure, the access message system could be perverted by licensee bad faith—this system has that vulnerability in common with all the institutions of democracy—but I do not fear this possibility. Broadcast journalism is becoming increas-

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[28] COM proposes 35 minutes per week or five minutes a day, scheduled at different times (including prime time).

[29] COM proposes that one half the access spots would be allocated on first-come, first-served basis, and the other half would be allocated on a "representative spokesperson" system.

[30] I assume that a licensee would continue to be legally responsible unless and until public access were a matter of statutory right. In *Farmers Educ. and Coop. Union* v. *WDAY*, 360 U.S. 525 (1959), the Supreme Court held that a licensee could not be held liable for defamatory language uttered during a time period which was required to be supplied under Section 315 of the Communications Act. If the fairness obligation arises under Section 315, the same immunity arguably applies. It might be contended that this immunity ought to extend to the fairness surrogate, access, as well. It seems much more probable, however, that if the licensee had any significant discretion as to who was permitted access and what was to be said, it probably would be held responsible. That, in turn, would require the licensee to monitor. Of course the obscenity or defamation laws could be changed by statute to insulate a broadcaster from liability for anything said on access messages, but such change seems unlikely. It also seems undesirable if one attaches, as I do, importance to the interests which the obscenity and defamation laws were meant to protect. In any event, nothing as radical as amending the Communications Act or Title 18 of the U.S. Code needs to be contemplated until time and experience clarified whether and to what extent such changes were necessary.

ingly professional: it is attracting increasingly capable and well-prepared people at all levels, and the performance of licensees—especially television licensees—in the public affairs sector of their activities is beginning to show it. Under these circumstances, it seems to me that we twentieth century bureaucrats ought to be willing to take a gamble on the broadcast media similar to that the Founding Fathers took on pamphlets and newspapers two hundred years ago.

MAY 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No. 77-1331

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. It is reproduced in Appendix A to the petition filed by the National Citizens Committee for Broadcasting (hereinafter "NCCB"). The opinions of the Federal Communications Commission (hereinafter "Commission") are reported at 48 FCC 2d 1 (1974) and 58 FCC 2d 691 (1976), and are reproduced as Appendix B and Appendix C, respectively, to NCCB's petition.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977. The Petition for a Writ of Certiorari was filed on March 20, 1978. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that the Federal Communications Commission acted within its discretion, and consistent with applicable constitutional and statutory principles, in deciding that ordinary product advertisements do not constitute statements on controversial issues of public importance and that the broadcast of such advertisements does not invoke reply obligations under the fairness doctrine?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions which ABC believes are involved include the First Amendment to the Constitution and Sections 315(a) and 326 of the Communications Act of 1934, as amended. The First Amendment and Section 315(a) are set forth at pages 2-3 of NCCB's Petition.

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides as follows: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

STATEMENT

Respondent American Broadcasting Companies, Inc. (hereinafter "ABC"), itself or through its subsidiaries, is the licensee of radio and television broadcasting stations and the operator of radio and television broadcasting networks. ABC participated in each of the several phases of the Commission's extensive deliberations which led to the issuance of the 1974 *Fairness Report*[1] under review, and participated as an intervenor in the court below.

While the proceeding before the Commission was wide-ranging, taking into account all facets of the fairness doctrine,[2] Petitioner NCCB's attack is focused on that aspect of the Commission's report which dealt with the application of the fairness doctrine to broadcast announcements referred to as product "commercials" or "advertisements."

In establishing a separate phase of the proceeding concerning the applicability of the fairness doctrine to broadcast advertising, the Commission was reacting to contemporary developments that had placed a gloss of uncertainty over this subject matter. For instance, the Com-

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[1] 48 FCC 2d 1 (1974).

[2] The fairness doctrine, developed by the Commission and subsequently sanctioned by Congress and the courts, requires broadcast licensees (1) to cover controversial issues of public importance and (2) to present differing viewpoints on those issues. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375-386 (1969). The Commission's general inquiry leading to the decision at issue represented the first major reassessment and clarification of the fairness doctrine in more than two decades. See *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949) ("Editorializing Report"). The review was structured to focus on four general areas: (1) the basic workings of the fairness doctrine; (2) application of the fairness doctrine to paid announcements; (3) access to the broadcast media for the discussion of public issues; and (4) the fairness doctrine and political broadcasts.

mission referred to a then-recent decision of the Court of Appeals for the District of Columbia Circuit[3] wherein the court had suggested that the Commission should, *inter alia*, give "fuller analysis" to whether ordinary product advertisements for a department store engaged in a labor dispute might be considered to address a controversial issue of public importance, thereby invoking fairness obligations. The decision in *Retail Store* also highlighted the question of whether the Commission's *Banzhaf* ruling[4]—attaching fairness doctrine reply obligations to the broadcast of cigarette advertisements—should be limited solely to cigarettes.

Accordingly, faced with conflicting and escalating pressures to expand application of the fairness doctrine to an increasing variety of broadcast advertisements,[5] the Commission considered an overall public inquiry to be a necessary and appropriate forum in which to explore these problems and reach solutions:

> "In the circumstances, we believe that an overall inquiry is the best way to proceed, thus allowing for maximum participation and maximum opportunity for sound policy formulation . . . . The issue really is the right of access, if any, to the broadcast media to respond to product commercials." 30 FCC 2d at 30.

The administrative inquiry that ensued was exhaustive. In addition to several separate opportunities for written

[3] *Retail Store Employees Union* v. *FCC*, 436 F.2d 248 (D.C. Cir. 1970).

[4] *WCBS-TV*, 8 FCC 2d 381, *reconsideration denied*, 9 FCC 2d 921 (1967), *aff'd sub nom. Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[5] As the Commission observed in its *Notice of Inquiry* [30 FCC 2d 26 (1971)], "almost without exception, product commercials can be argued to raise some significant, controversial issue—and as public awareness grows, so, too, does the occasion for making such arguments." 30 FCC 2d at 31.

comments, the Commission conducted special panel discussion sessions and held extensive oral argument. Participation was widespread and included broadcasters, public interest groups, government agencies, consumer groups, labor unions, academicians, and others.

In most respects, the Commission's 1974 *Fairness Report* constitutes a reaffirmation and elaboration of general fairness doctrine principles first enunciated in the 1949 *Editorializing Report* and interpreted and modified in case-by-case rulings during the ensuing years. However, the Commission also overruled its 1967 *Banzhaf* decision, deciding instead that ordinary product commercials do not make a "meaningful contribution toward informing the public on any side of any issue" and that such advertisements should not therefore be considered as falling within the scope of the fairness doctrine. 48 FCC 2d at 24. The Commission reasoned that the public interest would not be served by "stretch[ing] the fairness doctrine in an artificial way [to apply] it to commercials which play no meaningful or significant role in the debate of controversial issues." *Id.* at 28. The Commission therefore announced that, in the future, it would "apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." *Id.* at 26. At the same time, the Commission emphasized that other commercial announcements, such as editorial advertisements, and institutional advertising that "obviously addresses, and advocates a point of view on, a controversial issue of public importance" (*Id.* at 23), would continue to give rise to fairness obligations.

On petitions to review, the court below unanimously affirmed—on both constitutional and statutory grounds—the foregoing Commission ruling. First, it rejected "the suggestion that any speech protected by the first amendment must, as a matter of constitutional law, trigger

application of the fairness doctrine" (NCCB Pet., App. A, p. 21a). As the court explained, "[t]here is an obvious difference between the standard employed by the Commission for determining whether the fairness doctrine applies to advertisements—that is, whether the advertisement advocates one side of a controversial public issue—and [this Court's] holding in *Virginia State Board* that advertising is protected by the first amendment because it represents dissemination of valuable information important to the functioning of a free enterprise system." *Id.* Second, as to the statutory challenge, the court determined that "[a]s long as the Commission strictly enforces the . . . fairness obligation to present opposing points of view whenever there is direct, obvious, or explicit advocacy on one side of a controversial issue of public importance, it will be acting consistently with the public interest standard" of the Communications Act (NCCB Pet., App. A, p. 27a).

ARGUMENT

In attempting to persuade this Court to grant review of the lower court decision, NCCB misconstrues the decisions below and misreads this Court's recent commercial speech cases. As both the Commission and the court of appeals recognized, application of the fairness doctrine to ordinary product advertising would subvert rather than enhance the essential purposes of that basic policy. Similarly, in suggesting that this Court's recent commercial speech cases demand an opposite result, NCCB errs in applying the holdings of those cases to fairness doctrine principles.

I. The Decisions Below Affirm Rather Than Impede Basic Principles Underlying The Fairness Doctrine

NCCB characterizes the decisions below as constituting a fundamental departure from past practice and princi-

ples that will seriously erode critical elements of our system of broadcasting. On the contrary, it is NCCB's unadopted theories that would dramatically depart from the Commission's long-standing administration of the fairness doctrine.

While the Commission is charged with administering and interpreting the fairness doctrine, that regulatory responsibility has been carefully tempered so as to avoid infringements upon licensee discretion in the selection and scheduling of program matter.[6] The Commission's 1974 *Fairness Report* represents a careful bridging of these important principles. The Commission proceeded by general inquiry in an effort to define standards and set workable limits to govern a basic communications policy it has been entrusted to administer. *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1066-67 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). It has done so, however, with full recognition of the imposing constitutional restrictions on its involvement in the program and editorial judgments of broadcast licensees.

NCCB seeks to extend the fairness doctrine beyond this line of applicability carefully drawn by the Commission. The new regulatory vistas sought by NCCB would, however, undermine the essential purposes of the doctrine and violate the constitutionally protected concept of li-

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[6] See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 104-05 (1973) (hereinafter *CBS* v. *DNC*); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969); *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1007 n.11 (D.C. Cir. 1976); *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated* July 11, 1975, *cert. denied*, 424 U.S. 910 (1976). In the latter case, the court of appeals observed that "the same statute that provides authority for the FCC to implement the fairness doctrine . . . contains a clear provision (in Section 326) disclaiming and prohibiting censorship as part of the legislative scheme. In construing the fairness doctrine, both the Commission and the courts have proceeded carefully, mindful of the need for harmonizing these often conflicting considerations." 516 F.2d at 1111.

censee discretion upon which it is founded. What NCCB characterizes as an improper "gap" in the Commission's administration of the doctrine—i.e., the failure to approve an expansive utilization of the policy in the area of commercial advertising—is, in fact, a compelling response by the agency to these strongly imbedded constitutional and statutory values.

NCCB has also miscast the context in which the Commission's product commercial ruling was reached. It did not represent a sharp reversal of a long line of precedent. In fact, there was no defensible precedent at all until the 1967 *Banzhaf* decision when, in a highly controversial and emotional setting, the Commission applied the doctrine to the advertising of a single product—cigarettes. That decision, rather than affirming past interpretations, was essentially a precedent-shattering aberration that soon disclosed the implications and difficulties of applying the doctrine generally to product advertising. It set in motion a period in which an increasing number of questions arose concerning the wisdom and practicality of such an approach.

The general inquiry that followed was thus initiated amidst decisional turmoil and uncertainty, not against a backdrop of long-established and clearly defined policy as NCCB would suggest. The absence of clear-cut policy and the Commission's efforts to resolve the growing uncertainties also did not escape the attention of the courts. See, e.g., *CBS* v. *DNC*, *supra*, 412 U.S. at 131-32; *Neckritz* v. *FCC*, 502 F.2d 411, 415-17 (D.C. Cir. 1974); *Friends of the Earth* v. *FCC*, 449 F.2d 1164, 1170 (D.C. Cir. 1971).

The Commission's ultimate decision to exclude ordinary product commercials from fairness doctrine obligations was reached in a framework that assessed all relevant facts and circumstances. Relying on its many years of

experience in administering the doctrine, and weighing all of the contentions advanced, the Commission fashioned a solution that would best promote the underlying principles of the doctrine. The result, we respectfully submit, is one that offers the best hope for the effective implementation of the doctrine in the future.

First, since the purpose of the fairness doctrine is to promote informative discussion of important issues, the Commission properly determined that its application to advertising messages which merely urged the sale or use of a product or service would undermine and denigrate this fundamental purpose. The discussion of important public issues, the Commission reasonably found, can better proceed in different and in more informative contexts than through advertising messages oriented to the consumption or use of products and services.

The Commission was also legitimately concerned that a sweeping extension of the fairness doctrine to ordinary product advertising would thrust the government far too deeply into program content protected by the First Amendment. Since few commercials promoting the sale of products and services can escape someone's self-drawn inference traceable to some overall controversial issue,[7] the effect of applying the fairness doctrine to such broadcast announcements would be detailed scrutiny of all commercial content by the public, by broadcasters and, ultimately, by the Commission. Unavoidably, Commission involvement would be greatly expanded, with the intrusion of the government in licensee decision-making correspondingly escalated.

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[7] The court below referred to the "wide range of controversial products" that could become entangled in NCCB's suggested interpretation, citing the view of one commentator that the list of advertised products whose normal use could involve some significant issue is "virtually endless" (NCCB Pet., App. A, p. 30a).

Faced with all these concerns, the Commission concluded that "more meaningful ways" [8] were available for the presentation and discussion of important issues that may be involved in the purchase or use of certain products. Use of these other means, developed and implemented by broadcast licensees within the discretion entrusted to them and pursuant to the broad "public interest" standard, is a far better choice, the Commission found, than "a tortured or distorted application of fairness doctrine principles" [9] to a wide assortment of product commercials. The Commission's judgment on ordinary product advertising fully accords with this Court's holding in *CBS* v. *DNC*, *supra*, on editorial advertising:

> "If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized . . . . *The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not.* The public interest would no longer be 'paramount' but, rather, subordinate to private whim . . . . *Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.*" 412 U.S. at 124 (emphasis added).

If, as this Court has determined, it would be contrary to the public interest to permit the agenda for public issue discussion to be set by a mandated system of editorial advertisements, clearly the Commission is correct in rejecting an interpretation of the fairness doctrine that would permit that agenda to be dictated by ordinary product commercials.

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[8] *Reconsideration Order*, 58 FCC 2d at 698.

[9] *Fairness Report*, 48 FCC 2d at 27.

The Commission also recognized the need to develop standards which would preserve the fairness doctrine as a workable policy. Imposing the doctrine on ordinary product commercials would overwhelmingly magnify its coverage and thus threaten its viable administration and practical implementation. It would be increasingly unmanageable for broadcasters and the Commission to decide what issues were inferred from what product ads and whether such issues were sufficiently important to require a response. Aside from the exacerbated First Amendment problems, the shadings and variables involved would create an operational nightmare. Unlike the treatment of most public issues under the fairness doctrine, where the exposition of issues is usually limited in time and urgency, most product commercials for automobiles, gasoline, personal hygiene, grooming, etc., are necessarily continuous and repetitive. The result would be heightened confusion in which neither broadcasters nor the Commission would be able to determine with any degree of assurance the ramifications of even the most innocuous advertisements.

Sensibly, the Commission steered clear of these consequences, opting for the more workable set of standards it adopted. Rather than creating a "gap" in the administration of the fairness doctrine, as NCCB asserts, the Commission's ruling prevented an erosion that would have dramatically altered the effectiveness of the doctrine and undermined the First Amendment principles on which it is based.

II. The Commission's Conclusions Under The Fairness Doctrine Are Not Inconsistent With This Court's Recent Commercial Speech Cases

NCCB erroneously argues that this Court's decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens*

Consumer Council, Inc., 425 U.S. 748 (1976)[10] requires the Commission to treat ordinary product advertisements as equivalent to actual discussions of public issues.

Virginia Pharmacy holds that commercial speech (prescription drug advertising) is entitled to First Amendment protection—at least to the extent that a state statute prohibiting the publication of prescription prices by pharmacists was ruled invalid. The case does not, however, undercut the validity of the Commission's conclusion that ordinary product commercials do not contribute to public debate on important issues.

For instance, in *Virginia Pharmacy* the prescription drug advertisements are described in a way that could easily be applied to most product advertisements:

> "Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters." 425 U.S. at 761.

This acknowledged difference in the forms of speech is, in fact, a central theme of the decision. Thus, elsewhere the Court stresses that,

> "[in] concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common-sense differences between speech that does 'no more than propose a commercial transaction,' *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. at 385, . . . and other varieties." 425 U.S. at 771 n.24.

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[10] Hereinafter cited as *"Virginia Pharmacy"*. Brief reference is also made to two earlier decisions containing the seeds of the views that culminated in *Virginia Pharmacy;* namely *Bigelow* v. *Virginia*, 421 U.S. 809 (1975) and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (Brennan, J., dissenting).

Mr. Justice Stewart, in a Concurring Opinion, further observes that the Court's holding carves out and recognizes "that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other." *Id.* at 779.

This is essentially the same distinction the Commission has drawn here—albeit for different purposes. Speech can impart facts and not be part of public debate for fairness doctrine purposes. It is the Commission's responsibility to decide whether public debate and controversy are involved, and it has declared that they are not in the case of ordinary product commercials.

The Commission concluded that the public would be better informed about the important issues which may be associated with the use of products and services if "the decision to cover these and other matters of similar public concern" is made by each individual licensee "in the fulfillment of [its] public trustee responsibilities," and not by "a tortured or distorted application of fairness doctrine principles" to such announcements. 48 FCC 2d at 27. In reaching this conclusion, the Commission sanctioned an approach fully consistent with, rather than contrary to, decisions of this Court. Thus, as stated in *CBS* v. *DNC*, *supra*, the "paramount" interests of the public are best served if the agenda for discussion of public issues on radio and television stations is set by the broadcaster, and not by advertisers (see p. 10, *supra*).

CONCLUSION

The Commission refused to give birth to a system that would, inevitably, permit the agenda for public issue discussion to be set by ordinary product commercials and the attention of broadcast licensees diverted to "the fairness implications of [such] ads." *Fairness Report*, 58 FCC 2d at 698. As such, the Commission's decision

affirmatively promotes the paramount First Amendment rights that, as this Court declared in *Red Lion*, reside in the public. Rather than disjointed discussions dominated by a parade of ordinary product advertisements, under the Commission's decision broadcasters will be free to devote their full attention to those issues that flow from the needs of the communities they serve.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 10, 1978

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No. 77-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT CBS INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-45a) is reported at 567 F.2d 1095. The opinion of the Federal Communications Commission is reported at 48 F.C.C.2d 1 (Pet. App. B, pp. 46a-77a), and its opinion on reconsideration is reported at 58 F.C.C.2d 691 (Pet. App. C, pp. 78a-101a).

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977.[1] The petition for a writ of certiorari was filed on February 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Federal Communications Commission's fairness doctrine requires a broadcaster to assure that its audience is given an opportunity to hear contrasting views on controversial issues of public importance. This case involves the application of that doctrine to broadcast commercials. The question presented is whether the Commission violated the First Amendment or the public interest standard of the Communications Act, or acted arbitrarily and capriciously, in determining that ordinary product and service advertisements should be treated in the same manner as all other forms of broadcast material for purposes of application of the fairness doctrine.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides, in pertinent part:

> Nothing in the foregoing . . . shall be construed as relieving broadcasters . . . from the obligation im-

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[1] The Petition fails to include in the appendix a copy of the judgment of the court of appeals sought to be reviewed, as required by Rule 23(j) of the Rules of this Court.

posed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

This case involves the application of the fairness doctrine to the broadcast of ordinary product and service advertisements—that is, advertisements which are limited to promoting the sale of a product or service.

In 1971, the Federal Communications Commission (the "Commission") undertook its first full-scale review in over twenty years of the efficacy of the fairness doctrine and related policies.[2] Among the issues specifically set for consideration in that proceeding was whether fairness doctrine reply obligations should continue to attach to broadcasts of ordinary product and service advertisements.[3]

The advertising aspect of the inquiry was prompted by the Commission's experience over several years with the consequences of its 1967 *Banzhaf* decision.[4] In *Banzhaf*, the Commission had found that advertisements promoting the sale of cigarettes constituted advocacy of one side of a controversial issue of public importance as to the desirability of cigarette smoking. It therefore had held that such advertisements gave rise to a fairness doctrine obligation to broadcast the opposing point of view. The Commission

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[2] *Notice of Inquiry*, 30 F.C.C.2d 26 (1972). The Commission first issued a comprehensive formulation of the fairness doctrine in 1949. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

[3] 30 F.C.C.2d at 26.

[4] *WCBS-TV*, 8 F.C.C.2d 381, *reconsideration denied*, 9 F.C.C.2d 921 (1967), *aff'd*, *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969) (*"Banzhaf"*).

originally considered that its cigarette ruling was unique and established no rule of general applicability, and the court of appeals affirmed upon similar assumptions as to its uniqueness. *See Banzhaf, supra*, 405 F.2d at 1097 n.63. But the court of appeals subsequently held that the *Banzhaf* principle could not logically be so limited but must—"pending . . . a reformulation" of the doctrine [5]—extend to other advertisements promoting products and services whose use in society could be said to be controversial.[6]

The Commission recognized that once the line it sought to draw with cigarette advertising was breached, the potential scope of the *Banzhaf* principle was vast. In its *Notice of Inquiry*, the Commission stated (30 F.C.C.2d at 31) that

> almost without exception, product commercials can be argued to raise some significant controversial issue—and as public awareness grows, so, too, does the occasion for making such arguments.

And, in applying *Banzhaf*, the Commission and the courts had experienced great practical difficulties in defining the issues "implicitly" raised by commercials which expressly did nothing more than promote the sale of a product or service.[7]

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[5] *Friends of the Earth* v. *FCC*, 146 U.S. App. D.C. 88, 449 F.2d 1164, 1170 (1971).

[6] *Compare Friends of the Earth* v. *FCC, supra* (fairness doctrine, as defined in *Banzhaf*, applied to ordinary advertisements for large automobiles and leaded gasoline) *and Retail Store Employees Union* v. *FCC*, 141 U.S. App. D.C. 94, 436 F.2d 248 (1970) (product advertisement by store involved in a labor dispute implicitly raised the controversial issue of continued patronage) *with Green* v. *FCC*, 144 U.S. App. D.C. 353, 447 F.2d 323 (1971) (armed forces recruitment commercials did not implicitly raise the controversial issue of the desirability of military service).

[7] *See, e.g., Friends of the Earth* v. *FCC, supra*, 449 F.2d at 1169-70; *cf. Green* v. *FCC, supra*, 447 F.2d at 329-32.

In 1974, the Commission issued its *Fairness Report* in which it overruled its prior decision in *Banzhaf* and announced that henceforth ordinary product and service advertisements would not be found to fall within the scope of the fairness doctrine.[8] That *Report* and its reaffirmation in the Commission's 1976 decision on reconsideration[9] are the subjects of the decision below and the instant Petition.

The Commission's decision with respect to product and service advertisements followed from its analysis of the scope and overall operation of the fairness doctrine. As a general matter, the *Fairness Report* reaffirmed the Commission's traditional policy that the fairness doctrine should apply only to issues that "have a significant impact on society or its institutions" and that are the "subject of vigorous debate" in the community.[10] It also reaffirmed the Commission's general view that not all statements which purportedly bear some relationship to an ongoing public debate should trigger application of the fairness doctrine, but only those which directly present views on one side of a controversial issue. The Commission concluded that in determining whether the doctrine has been triggered by broadcast material, the analysis

> should focus not on whether the statement bears some tangential relevance to the . . . question, but rather on whether that statement, in the context of the ongoing community debate, is so *obviously and substantially related to the . . . issue as to amount to advocacy of a position* on that question (Pet. App. B, p. 58a) (emphasis added).

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[8] *In re The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act* (Docket No. 19260), *Fairness Report*, 48 F.C.C.2d 1, 22-28 (1974) (the "*Fairness Report*") (Pet. App. B, pp. 67a-73a).

[9] *Memorandum Opinion and Order on Reconsideration of the Fairness Report*, 58 F.C.C.2d 691, 697-99 (1976) (Pet. App. C, pp. 84a-86a).

[10] Pet. App. B, p. 57a.

The Commission acknowledged that this test excludes from the scope of the fairness doctrine statements which might be thought by some obliquely or implicitly to touch upon a controversial issue of public importance (*id.*). But it concluded that the journalistic interest of the broadcasters, and the public's interest in robust discussion of controversial issues, would be better served by such a standard than by a broader rule of relevance which would require close inspection of the content of broadcasts on an inference-by-inference basis, "with constant Governmental intervention to try to implement the policy . . ." (*id.*).

Applying those general standards to ordinary product and service advertisements, the Commission recognized a difference between advertisements which "actually consist of direct and substantial commentary on important public issues" (*id.*, p. 67a), and advertisements which simply promote public consumption of a product or service, without discussion of the public issues which might be related to their purchase or use.[11] The Commission concluded that the first category of advertisements containing overt commentary on issues, "could . . . make a meaningful contribution to the public debate" (*id.*). It therefore held that such overt advertisements would continue to be subject to the fairness doctrine (*id.*, p. 63a).[12]

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[11] The Commission also recognized a third category of commercials, those which arguably make false and misleading claims. The Commission concluded that the proper remedy for such deception was provided by existing Federal Trade Commission sanctions against false advertising, rather than by creation of a right of reply under the fairness doctrine (*id.*, pp. 72a-73a). The District of Columbia Circuit reached the same conclusion in a decision issued shortly before the release of the *Fairness Report*. *See Neckritz* v. *FCC*, 163 U.S. App. D.C. 409, 502 F.2d 411 (1974).

[12] The Commission noted that some advertisements—such as those which attempt "to present a favorable public image of a particular corporation or industry rather than to sell a product"—might be subject to the fairness doctrine if they presented "a meaningful

On the other hand, the Commission found that product and service advertisements which address themselves solely to the desirability of the product "make no meaningful contribution to informing the public on any side of any issue" (*id.*, p. 69a), and that the relationship between such advertisements and any ongoing public debate regarding the consequences of the manufacture or consumption of the product is too remote and inferential to justify imposition of fairness doctrine obligations (*id.*, pp. 69a-71a).

In the Commission's judgment, it would "make little practical sense to view advertisements such as these as presenting a meaningful discussion of a controversial issue of public importance" (*id.*, p. 70a):

> [A]pplication of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy. In the cigarette case, for example, the ads run by the industry did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health. At the time of our ruling, Commission Loevinger suggested that we were not really encouraging a balanced debate but, rather, were simply imposing our view that discouraging smoking was in the public interest.

Adhering to its view of the fairness doctrine as issue-oriented, the Commission was convinced that matching a discussion of issues on one side against inducements to buy a product on the other would not successfully achieve "fairness" and would not be in "keeping with the basic purposes of the fairness doctrine" (*id.*).

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statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance" (Pet. App. B, p. 68a). It stated that the broadcaster would be required to make a judgment as to the applicability of the fairness doctrine to such advertisements (*id.*).

From its own experience, the Commission concluded that its *Banzhaf* doctrine was not subject to limitation within its own terms. As efforts to apply that decision had shown, it was difficult to determine which issues were implicitly addressed by ordinary product and service advertisements. And there was a vast array of products and services whose use had been or could be the subject of controversy.[13] Indeed, under *Banzhaf*, commercials for competing products might be said to have presented contrasting viewpoints, forcing broadcasters to devote their energies to balancing two sets of commercials, neither of which explicitly discussed a public issue or advanced the public's understanding of the issue (*id.*, p. 71a).[14] In any event, the requirement of balancing the

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[13] The comments before the Commission showed that few lines could be drawn. Petitioner proposed application of the doctrine to advertisements for electrical products, automobiles, aspirin and all over-the-counter drugs, among other products. NCCB Comments at 15. Others suggested that the fairness doctrine should apply to all advertisements which "promote the notion that a woman's place is in the home or that 'the best ones are thin and rich,'" which "encourage people to buy on credit," or which "promote the notion that the consumer will get more from a dollar spent at the supermarket or beauty parlor than from a dollar spent on an education bond issue or a dollar donated to the preservation of a local park." *See, e.g.*, Friends of the Earth Comments at 15.

[14] For example, in *Friends of the Earth* v. *FCC*, *supra*, the court of appeals had held that advertisements for large cars and leaded gasoline appeared, under the *Banzhaf* doctrine, to raise health issues arising from the use of these products. The court stated that "pending . . . a reformulation" of *Banzhaf*, there was no basis for distinguishing cigarette advertisements from those for large cars and leaded gasoline. 449 F.2d 1170. As the Commission noted in the *Fairness Report*, however, the advertisements there at issue

> made no attempt at all to discuss the product in the context of the air pollution controversy. If these advertisements presented one point of view on the issue, then, by the same reasoning, the "contrasting" viewpoint must have been similarly presented in ads for low-powered cars (Pet. App. B, p. 71a).

[Footnote continued on page 9]

information contained in the potential array of advertisements for controversial products or services would divert broadcasters' attention from other aspects of their overall obligation to inform the public (*id.*).

The Commission found that the public would be better served by a system that depends on the journalistic discretion of broadcasters to inform the public about controversies surrounding the social utility of advertised products and services than by a Commission effort artificially to force dissemination of information on the basis of a strained interpretation of the content of broadcast advertisements (*id.*, p. 72a):

> [T]he decision to cover these and other matters of similar public concern appropriately lies with individual licensees in the fulfillment of their public trustee responsibilities, and should not grow out of a tortured or distorted application of fairness doctrine principles to announcements in which public issues are not discussed.

The Commission therefore concluded that the application of the fairness doctrine to cigarette commercials had resulted in a "serious departure" from the doctrine's central purpose of developing an informed public opinion (*id.*, p. 69a). Accordingly, it overruled *Banzhaf* (*id.*, p. 71a).

On petitions for review, the court of appeals unanimously affirmed the treatment of product advertisements

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[14] [Continued]

The Commission clearly foresaw the outcome of such an approach:

> The problem with this kind of logic is that it engages both broadcasters and the Commission in the trivial task of "balancing" two sets of commercials which contribute nothing to public understanding of the underlying issue of how to deal with the problem of air pollution (*id.*, p. 71a).

in the *Fairness Report* (Pet. App. A).[15] The court held that the Commission had acted reasonably in concluding that ordinary product commercials do not constitute meaningful discussion of controversial issues of public importance within the meaning of the fairness doctrine; that it had given reasoned consideration to each of the factors pertinent to its change of policy; and that its policy determination concerning the proper scope of the fairness doctrine was supported by "substantial, though not necessarily conclusive, evidence" (Pet. App. A, pp. 27a-31a). The court also agreed with the Commission that equating ordinary product and service advertisements with statements about controversial issues produced a "fundamental asymmetry" in the debate inconsistent with "the objective of presenting all viewpoints on controversial issues of public importance," which is the fundamental purpose of the fairness doctrine (*id.*, p. 29a).

The court below rejected petitioner's contention that the result reached by the Commission was inconsistent with the First Amendment or the Communications Act. It found no merit to petitioner's argument that commercial speech triggers application of the fairness doctrine simply because such speech is constitutionally protected (*id.*, p. 21a). And it found no support for the assertion that Congress had codified in the Communications Act a Commission practice of applying the fairness doctrine to ordinary product advertisements (*id.*, pp. 24a-26a). Finally, the court held that the "public interest standard" of the Act did not inherently require adoption of the *Banzhaf* doctrine, but gave the Commission great discretion in that regard—discretion which it held the Commission had properly exercised in deciding to overrule *Banzhaf* (*id.*, pp. 26a-28a).

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[15] The court remanded a portion of the case to the Commission with instructions that it give further consideration to two suggestions submitted during the comment period concerning aspects of the *Fairness Report* unrelated to the treatment of ordinary product and service advertisements (Pet. App. A, pp. 36a-37a, 41a-42a).

ARGUMENT

Congress left questions of the scope and applicability of the fairness doctrine to the discretion of the Commission, "which it has given the flexibility to experiment with new ideas as changing conditions require." [16] Indeed, this Court has cautioned against freezing any one step taken by the Commission into a constitutional requirement. *See CBS* v. *DNC*, *supra*, 412 U.S. at 132. And it has further noted that Congress' general endorsement of the Commission's fairness principles in the 1959 amendments of the Communications Act did not statutorily mandate the specific details of the fairness doctrine or restrict the Commission's discretion to continue adapting the doctrine to changing conditions. *See Red Lion*, *supra*, 395 U.S. at 384-85.

The portion of the *Fairness Report* challenged by petitioner represents a modification of one particular aspect of the fairness doctrine which the Commission found had been a "serious departure" from the doctrine's goals and history (Pet. App. B, p. 69a). The modification was intended to bring the treatment of ordinary product and service advertisements into harmony with the general principles which underlie the doctrine. The Commission fully evaluated the policy choices before it and articulated a reasoned and rational basis for the change in its policy. Its judgment is entitled to great deference. *CBS* v. *DNC*, *supra*, 412 U.S. at 102.

There is no conflict among the circuits regarding these issues. To the contrary, the only other court which has considered the Commission's action affirmed the agency's decision. In *Public Interest Research Group* v. *FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), which the Petition fails even to mention, the court

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[16] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122 (1973) (*"CBS* v. *DNC"*); *see also Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (*"Red Lion"*).

of appeals concluded, after reviewing the *Fairness Report*, that

> [u]nless the standard of rationality is to be narrowed to a circle no wider than a court's private judgments, we cannot rule that the Commission's policies here are "arbitrary, capricious, [or] an abuse of discretion". . . . 522 F.2d at 1066.

Faced with these obstacles to further review of this case, petitioner has attempted to cast its disagreement with the Commission's policy judgments in the form of constitutional and statutory arguments. These contentions are plainly insubstantial and were properly rejected by the court of appeals as logically defective and unpersuasive.

In essence, petitioner is simply seeking to have this Court substitute public policy views which petitioner would prefer for those reached by the agency. But only the Commission or Congress can modify agency policy judgments that were lawfully reached. It is not the role of the courts to reweigh the competing policy interests considered by the Commission. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 46 U.S.L.W. 4301, 4311, No. 76-419, decided April 3, 1978.

1. Petitioner contends (Pet. 8-11) that, under this Court's commercial speech decisions, the Commission was required by the First Amendment to attach fairness doctrine obligations to ordinary product advertisements. But, as the court of appeals correctly observed (Pet. App. A, p. 19a), this claim is "based on a fundamental misunderstanding of the relationship between constitutional protection of commercial, or any other type of, speech and the functioning of the fairness doctrine."

The mere fact that material which has been broadcast may be protected by the First Amendment does not give rise to application of the fairness doctrine. The courts

and the Commission regularly have refused to attach fairness doctrine reply obligations to speech that was constitutionally protected but failed to comment meaningfully and directly on a controversial issue of public importance.[17] The commercial speech cases on which petitioner relies[18] have expanded the categories of speech entitled to constitutional protection. But those decisions surely cannot be read as creating a preferred position for commercial speech. And they clearly do not bar the Commission from applying the same fairness doctrine standards of specificity and relevance to such speech as it applies to all other forms of broadcast material in order to determine whether the fairness doctrine should apply.[19]

Moreover, as both the Commission and the court below suggested, the policies of the First Amendment, as defined by this Court in *CBS* v. *DNC*, *supra*, were in fact furthered by the Commission's decision with respect to ordinary product and service advertisements. The Commission's approach assumes that the public is more likely

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[17] *See, e.g., Healey* v. *FCC*, 148 U.S. App. D.C. 409, 460 F.2d 917 (1972); *Green* v. *FCC*, *supra*, 447 F.2d 323; *Polish American Congress* v. *FCC*, 520 F.2d 1248 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

[18] *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bates* v. *Bar of Arizona*, 432 U.S. 350 (1977).

[19] Petitioner also contends that the Commission's decision was erroneous because it was based on the expressed view that commercials "are at best a negligible part of any exposition of ideas, and are of . . . slight social value as a step to truth" (Pet. App. B, p. 70a, *quoting from Banzhaf*, *supra*, 405 F.2d at 1101-02). The court of appeals correctly found (Pet. App. A, p. 22a) that this statement, which predated some of this Court's recent commercial speech decisions, did not go to the heart of the Commission's holding, and that "[t]he persuasiveness—or lack thereof—of the Commission's essential finding" that standard product commercials do not constitute meaningful discussion "is not altered by " those recent cases (*id.*).

to obtain meaningful coverage of the widest range of issues through reliance on the journalistic judgment of the broadcaster as to the issues that should be covered and the nature of the coverage.[20] *See CBS* v. *DNC*, *supra*, 412 U.S. at 120, 124-25. The Commission also concluded that the journalistic discretion of the broadcasters would be severely inhibited by a system in which the government searched ordinary product and service advertisements for implicit issues and messages and forced broadcasters to "balance" any such implicit advocacy. *See id.* at 124, 126-27.[21]

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[20] The Commission's decision will not, as petitioner suggests, deny the public information about the underlying issues surrounding the use of controversial products. First, the abandonment of the *Banzhaf* approach will not deprive the public of balanced information and arguments about these issues, because, as the Commission and the court below concluded, ordinary product advertisements do not present meaningful discussions on these questions. Applying the doctrine would thus at best provide the public with only one side of these disputes. Second, as the *Fairness Report* clearly stated, the overruling of *Banzhaf* does not mean that broadcasters will fail in their continuing responsibility to keep the public informed about controversial issues in the community, including disputes about the manufacture and use of advertised products, if those questions become matters of public concern (Pet. App. B, pp. 71a-73a).

[21] Petitioner also presents (Pet. 11-14) a more generalized First Amendment attack on the decision below. This argument essentially runs as follows: The policies underlying the First Amendment favor the presentation of diverse views to the public; attaching fairness doctrine obligations to ordinary product advertisements would further the dissemination of multiple views; therefore, the imposition of fairness doctrine obligations is constitutionally required. The court of appeals properly rejected this argument as a "non-sequitur" (Pet. App. A, p. 21a):

> While an ultimate function of both the first amendment and the fairness doctrine may be to encourage the dissemination of viewpoints and information, this does not mean that the two principles cover exactly the same ground. There is an obvious difference between the standard employed by the Commission for determining whether the fairness doctrine applies to advertisements . . . and the holding in *Virginia State Board* that advertising is protected by the first amendment because it repre-

2. As previously noted, Congress has entrusted the Commission with broad discretion to shape the fairness doctrine. It is frivolous to assert (Pet. 14-18) that in amending the equal opportunities provisions of Section 315 of the Communications Act in 1959, Congress codified a prior Commission policy of attaching fairness doctrine obligations to ordinary product advertisements.

While the 1959 amendments generally sanctioned the Commission's fairness principles, "specific recognition in statutory form" is necessary to demonstrate that the amendments ratified and codified a particular aspect of prior Commission policy. *Red Lion, supra*, 395 U.S. at 380-82. Petitioner has not pointed to anything in the language or legislative history of the 1959 amendments which suggests that Congress even considered, much less approved, any purported Commission policy of applying the fairness doctrine to product commercials.[22]

Petitioner's argument that such a policy even existed is based solely upon a dictum in an early Commission case. *See Sam Morris*, 11 F.C.C. 197 (1946).[23] As the court below found in *Banzhaf*, and reaffirmed in this case (Pet. App. A, p. 26a n.51), *Sam Morris* did not establish a policy that ordinary product advertisements were subject to the fairness doctrine:

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sents dissemination of valuable information important to the functioning of a free enterprise system (footnote omitted).

[22] Petitioner erroneously relies (Pet. 16) on the failure of later Congresses to overrule *Banzhaf* as evidence that such a doctrine was codified in 1959. But as the Court noted in a similar context in *Red Lion*, "unsuccessful attempts at legislation are not the best of guides to legislative intent." 395 U.S. at 382 n.11. *Accord, Public Interest Research Group* v. *FCC, supra*, 522 F.2d at 1066-67; *see also Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 241-42 (1970); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946).

[23] Although *Sam Morris* antedated the first comprehensive formulation of the fairness doctrine, the *Editorializing Report* does not refer to the existence of the policy petitioner would read into that case.

> The case has not been followed in the twenty years since it was decided. It is not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials regardless of whether opponents buy—or even request—such broadcast time. *Banzhaf*, 405 F.2d at 1092.

Therefore, the court of appeals correctly held that the 1959 amendments could not be construed to have codified the approach ultimately adopted in *Banzhaf* (Pet. App. A, p. 26a). *See CBS* v. *DNC*, *supra*, 412 U.S. at 113 n.11.

3. Petitioner further contends that the Commission improperly narrowed the reach of the fairness doctrine, in a fashion inconsistent with the public interest standard of the Act. It argues that commercial speech is the only form of speech in which the Commission requires discussion of "underlying issues" before reply obligations will attach.[24] That contention mischaracterizes the Commission's actual conclusion. The agency found that in order to provide meaningful discussion of controversial issues of public importance, the fairness doctrine analysis must focus on what are the real issues in dispute, and the debate must not be skewed by the fruit-

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[24] Petitioner also contends (Pet. 18) that the "public interest standard" of the Act requires that reply obligations attach to commercials for products and services which pose a risk to the "public health." But this Court has consistently held that the use of the term "public interest" in a regulatory statute is not a "broad license to promote the general welfare"; rather, the words "take [their] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). Here, the Court has already found that the Communications Act does not impose specific fairness doctrine obligations on either broadcasters or the Commission. *CBS* v. *DNC*, *supra*, 412 U.S. at 122. As noted above, Congress determined that the better way to serve the public was to leave the question of the scope of the fairness doctrine to the discretion of the Commission. Furthermore, serious First Amendment questions would be raised by a system in which the government could dictate the programming material to be broadcast by invocation of a standard as broad and vague as "the public interest" or "public health." *See Banzhaf*, *supra*, 405 F.2d at 1099.

less task of attempting to balance sets of commercials which do not directly address those issues or enhance the public's understanding. As the Court below observed, the Commission's judgment is

> more aptly characterized as being based on the view that the ultimate controversial issue of public importance is not the desirability of the product but the issues raised in the debate over desirability. Merely advocating the use of a product does not present information or involve discussion of these underlying issues . . . (Pet. App. A, pp. 28a-29a).

As so defined, it is clear from the Commission's opinion, and the affirmance of the court below, that the actual effect of the Commission's action was to apply to commercial speech, for fairness doctrine purposes, the same tests of relevance and specificity that the Commission applies to all other broadcast speech.

In sum, this case presents no substantial issues or questions requiring the attention of the Court. There is no conflict among the courts of appeals. The Commission's decision and the opinion of the court below are fully consistent with the decisions of this Court. To the extent that petitioner believes that the policy judgments made by the Commission are wrong and should be changed, this Court has recently made clear that such policy questions are "appropriately resolved in Congress" and in the agencies granted authority to make those judgments; they "are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action." *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, *supra*, 46 U.S.L.W. at 4311 (emphasis in original).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 77-1331

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 567 F.2d 1095. The report of the Federal Communications Commission (Pet. App. 46a-77a) is reported at 48 F.C.C. 2d 1. The order of the Commission denying reconsideration (Pet. App. 78a-101a) is reported at 58 F.C.C. 2d 691.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977. The petition for a writ of certiorari was filed on February 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the First Amendment or the Communications Act of 1934 prohibits the Federal Communications Commission from determining that the fairness doctrine should not apply to standard product commercials unless they obviously and meaningfully discuss controversial issues of public importance.

STATEMENT

The fairness doctrine requires broadcast licensees (1) to cover controversial issues of public importance, and (2) to present differing viewpoints on those issues. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111. The Federal Communications Commission developed the doctrine under its authority to regulate broadcasting in the public interest, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 375-386, and first articulated its general principles in 1949. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246.

The Commission explicitly applied the fairness doctrine to standard product advertisements in 1967, ruling that ordinary cigarette commercials could

trigger an obligation to present viewpoints against smoking. *Television Station WCBS-TV*, 8 F.C.C. 2d 381, reconsideration denied, 9 F.C.C. 2d 921, affirmed *sub nom. Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842. Although the Commission had suggested that cigarette advertisements presented unique considerations (8 F.C.C. 2d at 381-382; 9 F.C.C. 2d at 942-943), the Court of Appeals for the District of Columbia Circuit later held that the principles expounded in *Television Station WCBS-TV* required the Commission to give reasoned consideration to fairness doctrine complaints respecting commercials for a department store during a strike by store employees. *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248, 256-259 (C.A.D.C.). The court subsequently held that the fairness doctrine was implicated by commercials for high-powered automobiles considered by many to be an environmental hazard. See *Friends of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (C.A.D.C.).

The Commission initiated a rule-making proceeding in 1971 to consider, among other things, whether there is "some workable standard for distinguishing various categories o[f] commercials, some of which would give rise to fairness or public interest duties and some of which would not?" *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Notice of Inquiry*, 30 F.C.C. 2d 26, 32. That

proceeding culminated in the Commission's *Fairness Report*, issued in June 1974. In the *Fairness Report* (Pet. App. 46a-77a) the Commission reversed its policy of applying the fairness doctrine to standard product commercials, concluding that ordinary product advertisements "make no meaningful contribution toward informing the public on any side of any issue" and that such advertisements therefore should not be found to fall within the scope of the fairness doctrine (Pet. App. 69a). That conclusion is at issue in this case.

The Commission flatly concluded in the *Fairness Report* that it had been a mistake to subject standard product advertising to the fairness doctrine in the first place. Reconsidering the question, the Commission stated its view that "application of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy" (Pet. App. 70a). The Commission also stated that adherence to its earlier decision would divert licensees' attention "from their public trustee responsibilities in aiding in the development of an informed public opinion" (Pet. App. 71a). As a result, the Commission concluded, the public interest would not be served by "stretch[ing] the fairness doctrine in an artificial way [to apply] it to commercials which play no meaningful or significant role in the debate of controversial issues" (Pet. App. 73a).

The Commission did not exclude all product commercials from the reach of the fairness doctrine. Rather the Commission distinguished between ordinary product commercials which seek only to sell a

product and "those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues" (Pet. App. 71a). The latter category of advertisements, like editorial advertising and institutional advertising that "obviously addresses, and advocates a point of view on, a controversial issue of public importance," will continue to give rise to fairness obligations (Pet. App. 68a).

On petition for review, the court of appeals upheld the Commission's determination.[1] The court held that the First Amendment does not require application of the fairness doctrine to all speech protected by the Amendment, remarking that "there is no right to broadcast a particular point of view simply because that point of view is protected by the first amendment" (Pet. App. 20a). The court found that, although the Commission perhaps misstated the extent to which commercial speech is protected by the First Amendment, that misstatement was not material to the ultimate conclusion regarding application of the fairness doctrine because the pertinent issue was not whether product commercials were protected by the First Amendment but whether ordinary product advertisements presented "'a meaningful discussion of a controversial issue of public importance'" (Pet. App. 22a, *quoting* Pet. App. 70a). Since the Com-

[1] The court, however, remanded the orders to the Commission for further consideration of certain access and other proposals that had been made to the Commission for implementation of the fairness doctrine in other contexts (Pet. App. 35a-42a, 45a).

mission could reasonably conclude that they did not, it was free to allow licensees to make their own judgments about the presentation of competing views.

The court of appeals also rejected (Pet. App. 23a-31a) arguments that the Commission was prohibited from modifying the product commercial policy by the public interest standard of the Communications Act and Congress' 1959 amendments to the Communications Act. 73 Stat. 557, 47 U.S.C. 315(a). The court noted that no clear policy on the applicability of the fairness doctrine to product commercials had existed in 1959 (Pet. App. 25a-26a);[2] that it had previously recognized the Commission's authority to modify the product commercial policy (Pet. App. 26a, n. 53);[3] and that it was reasonable for the Commission to conclude that the public interest in the efficient operation of the fairness doctrine would be better served by removing product commercials from the applicability of the doctrine (Pet. App. 27a-31a).

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[2] Although petitioner contended that a 1946 F.C.C. decision had established the applicability of the fairness doctrine to product commercials (Pet. App. 25a-26a), the court of appeals found that argument unpersuasive. See note 7, *infra*.

[3] *Friends of the Earth* v. *Federal Communications Commission, supra*, 449 F.2d at 1170. The court of appeals also pointed out this Court's statement in *Columbia Broadcasting System* v. *Democratic National Committee, supra*, 412 U.S. at 132, that the fairness inquiry was one step in "a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees" (Pet. App. 27a, n. 55).

ARGUMENT

The decision of the court of appeals, holding that the Commission need not apply the fairness doctrine to ordinary product commercials, is correct and fully consistent with prior decisions of this Court. It does not warrant further review.

1. Petitioner contends (Pet. 8-11) that the First Amendment requires the Commission to apply the fairness doctrine to standard product commercials. As the court of appeals noted (Pet. App. 19a), that argument is "based on a fundamental misunderstanding of the relationship between constitutional protection of commercial, or any other type of, speech and the functioning of the fairness doctrine."

The fact that particular forms of speech are entitled to protection from government interference under the First Amendment does not mean that they must be broadcast by unwilling stations. Indeed, given the broad categories of speech subject to constitutional protection and the relatively scarce resource of communications frequencies, that proposition would seem self-evident. "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102. As this

Court recognized in *Columbia Broadcasting*, *supra*, when it held that licensed stations need not extend time for paid editorial commercials, there is no necessary correspondence between the right to speak under the First Amendment and a right to speak through the broadcast media.

It is therefore not enough to suggest, as petitioner does, that the fairness doctrine must apply to ordinary product advertisements because they provide useful information to the public. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748; *Bigelow* v. *Virginia*, 421 U.S. 809. That fact, standing alone, gives no assured access to broadcast channels. Rather, the pertinent inquiry is whether the Commission's decision to exempt ordinary product commercials from the fairness doctrine so deprives the public of important ideas and information as to constitute an infringement of its right to be informed. That question, in turn, depends upon an assessment of the fairness doctrine itself and the purposes it serves.

"[U]nder the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 112. The *Fairness Report* does not denigrate that responsibility; to the contrary, the *Report* emphasizes that "[t]he purpose and foundation of the fairness doctrine is * * * that of the First Amendment itself: 'to preserve an un-

inhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee' [citation omitted]" (Pet. App. 51a). The Commission, therefore, continues to require that stations give adequate time for the discussion of public issues and a reasonable opportunity for opposing viewpoints to be heard (Pet. App. 53a-62a). Those obligations assure the public, at a minimum, of reasonable coverage of significant issues.

The fairness doctrine also applies to certain paid advertisements. Tracking the standard developed earlier for determining whether a program actually presents a position on a controversial issue (Pet. App. 58a), the Commission decided that the doctrine should apply to paid editorial commercials presenting "direct and substantial commentary on important public issues" (Pet. App. 67a) and to other commercials "devoted in an obvious and meaningful way to the discussion of public issues" (Pet. App. 71a). Absent "some meaningful or substantive discussion," however, the Commission found no reason to impose similar consequences on the broadcast of typical product commercials which, it concluded, cannot "realistically be said to inform the public on any side of a controversial issue of public importance" (*ibid.*).

Here, the Commission reasonably and properly concluded that the public is better served by focusing

the fairness doctrine on other targets. The standard product advertisement addresses controversial issues indirectly at best—indeed, if it addresses such issues obviously and meaningfully, it becomes subject to the fairness doctrine—and rebuttals directed singlemindedly at the underlying issue might well weight the balance of discussion heavily against the original advertiser (Pet. App. 70a).[4] Moreover, the involvement of broadcasters in the sensitive task of mediating disputes could "divert [their] attention * * * from their public trustee responsibilities in aiding the development of an informed public opinion" (Pet. App. 71a). To the extent that the Commission also would be required to determine the right to respond to ordinary commercials, the intrusion of government into the day-to-day operation of the broadcast media would be increased. It was, therefore, entirely reasonable for the Commission to conclude that any possible benefits to the public from application of the fairness doctrine to ordinary product advertisements would be outweighed by the serious inherent costs.

2. Petitioner, relying upon *Columbia Broadcasting System* v. *Democratic National Committee*, *supra*, also contends (Pet. 12) that the Commission's modification of the product commercial policy created a

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[4] Product advertisers could revamp their advertising, of course, to discuss underlying issues directly. But that course would simply compel commercial advertisements to be fields of public debate. The Commission could surely conclude that other forms for debate of public issues are more appropriate.

"gap in the administration of the fairness doctrine" and "extinguished the public's First Amendment right to receive contrasting views on issues relating to controversial products." We disagree.

The Commission has not exempted all consumer information from the fairness doctrine, but only standard product commercials that contain no obvious and meaningful discussion of public issues. "Under the general fairness doctrine, broadcasters—as trustees for their communities—are required to make a positive effort to implement a meaningful discussion of major public issues and in practical effect consumer issues will receive a significant amount of coverage" (Pet. App. 73a). Consumer information is regularly presented in public service announcements, newscasts and a variety of discussion and information programming. In addition, broadcasters are free to treat product commercials as though subject to the fairness doctrine if they believe it appropriate.[5]

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[5] The state statute in *Virginia State Board of Pharmacy, supra,* flatly prohibited the dissemination of certain product information. The Commission's action here involves no such ban. Broadcast stations are free to present "views on issues relating to controversial products" (Pet. 12) to whatever extent and in whatever format they desire. Moreover, as a result of the partial remand of the decision below (see n. 1, *supra*), the Commission recently has begun a new proceeding to consider alternatives for achieving compliance with the goals of the fairness doctrine, including "a right of access" policy. See *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Notice of Inquiry,* BC Docket No. 78-60, FCC 78-108, released March 2, 1978, 43 Fed. Reg. 9201.

The Commission, in striking a balance among competing interests, has concluded that the public would be better informed about important issues associated with the use of products and services if "the decision to cover these and other matters of similar public concern" is made by each individual licensee "in the fulfillment of * * * [its] public trustee responsibilities," and not by a "tortured or distorted application of fairness doctrine principles" to such announcements (Pet. App. 72a). That approach is entirely consistent with *Columbia Broadcasting System*, *supra*. There, the Court stated that the "paramount" interests of the public are best served if broadcasters, not advertisers, determine the agenda for discussion of public issues, noting that a system in which licensees could not control the agenda for discussion would result in an "erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees * * * to private individuals * * *." 412 U.S. at 124. *A fortiori*, there is no requirement that the agenda for public discussion be set by the perceived implications of ordinary product advertising. See also Pet. App. 30a.

3. Petitioner also argues (Pet. 14-16) that a 1959 amendment to Section 315 of the Communications Act prohibited the Commission from modifying the product commercial policy. The court of appeals correctly rejected this contention (Pet. App. 23a-31a).

Congress could not have ratified or frozen into existence a Commission policy concerning advertise-

ments in 1959 because no articulated policy existed until the cigarette commercial decision in 1967.[6] Furthermore, this Court held in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, that while Congress in amending Section 315(a) had approved the general tenets of the fairness doctrine, it had left questions of applications and accommodation to the Commission. 395 U.S. at 380-386.[7] As the First Circuit has recognized in rejecting an identical argument, *Public Interest Research Group* v. *Federal Communications Commission*, 522 F.2d 1060, 1066-1067, certiorari denied, 424 U.S. 965, nothing in the amended Section 315(a) or in its legislative history suggests that Congress wished so to limit the

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[6] Petitioner errs in relying on *dictum* in *Sam Morris*, 11 F.C.C. 197 (1946), as the origin of the application of the fairness doctrine to commercials (Pet. 14-15). The fairness doctrine itself was not articulated until 1949, three years after the *Sam Morris* decision, although the obligation to cover public issues fairly had always existed under the public interest standard. *Report on Editorializing, supra.* Moreover, the *dictum* was not followed once during the 13 years between its issuance and the 1959 amendments to Section 315. The court of appeals properly rejected petitioner's interpretation of the *Sam Morris* ruling in the decision below (Pet. App. 25a-26a) just as it declined to place such reliance on *Sam Morris* in the *Banzhaf* decision in 1968. See *Banzhaf* v. *Federal Communications Commission, supra*, 405 F.2d at 1092.

[7] See also *Columbia Broadcasting System* v. *Democratic National Committee, supra*, 412 U.S. at 122, where this Court stated that Congress had given the Commission the flexibility to experiment in the fairness area "with new ideas as changing conditions require."

Commission's discretion to adapt its policies to the changing needs of its licensees and the general public.[8]

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[8] Although petitioner argues that the decision below is inconsistent with earlier cases from the Court of Appeals for the District of Columbia Circuit, that contention, to the extent relevant at all, is incorrect. In *Banzhaf* v. *Federal Communications Commission, supra*, the court gave "cautious approval" to the cigarette commercial ruling, but did not hold that the Commission was required to apply the fairness doctrine. 405 F.2d at 1099. While the court did state that the cigarette ruling was "required by the public interest" (Pet. 15), the court was merely using the Commission's own words. The Commission, of course, has rejected that conclusion. Moreover, the court of appeals in the decision below repudiated the language as "stronger * * * than was necessary * * *" (Pet. App. 26a).

In *Friends of the Earth* v. *Federal Communications Commission, supra*, the court merely required that the Commission follow its cigarette commercial precedent. Noting the Commission's pending fairness study, however, the court stated:

> *Pending* * * * *a reformulation of its position*, we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

449 F.2d at 1170 (emphasis added). In *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248, the court remanded for further proceedings a Commission grant of license renewal without hearing, determining, *inter alia*, that in light of *Banzhaf* and of national labor policy, the Commission had not given adequate analysis to fairness doctrine complaints based on department store commercials aired during a strike of store employees. *Id.* at 256-259.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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